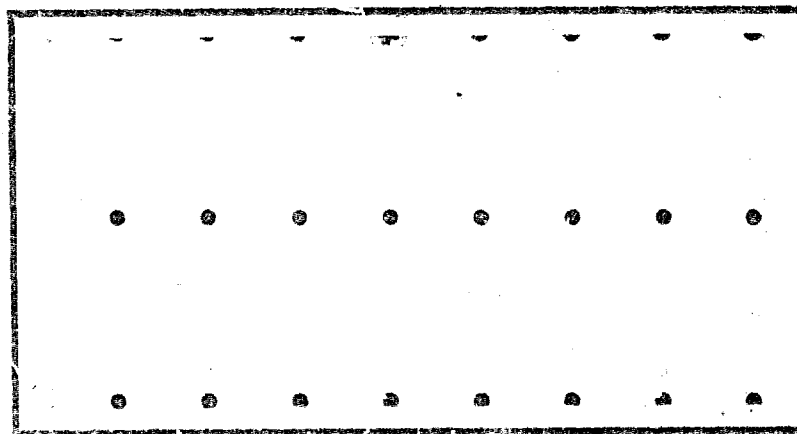


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AN ANALYSIS OF AIR FORCE SERVICE  
CONTRACT CASES APPEALED TO THE ARMED  
SERVICES BOARD OF CONTRACT APPEALS

THESIS

Diane L. Bowden  
First Lieutenant, USAF

AFIT/GCM/DEM/88S-1

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AFIT/GCM/DEM/88S-1

AN ANALYSIS OF AIR FORCE SERVICE CONTRACT CASES  
APPEALED TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS

THESIS

Presented to the Faculty of the School of Systems and Logistics  
of the Air Force Institute of Technology

Air University

In Partial Fulfillment of the  
Requirements for the Degree of  
Master of Science in Contracting Management

Diane L. Bowden, B.S.  
First Lieutenant, USAF

September 1988

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## Preface

I undertook this study to gather, analyze, and condense information that might be useful to contracting and contract management personnel. Armed Services Board of Contract Appeals cases provide valuable information which is very extensive and sometimes difficult to assimilate. This study provides an overview of some of the more prevalent claims and issues that have been appealed to the ASBCA. The appendices are especially helpful to find cases of a particular type of service or a claim and issue category. I hope it will be helpful to government personnel involved in different aspects of contract management.

In researching and writing this thesis, I had a great deal of help from several people. I especially thank Mr. Doug Osgood, my advisor, for providing professional technical advice and guidance throughout the research effort. I also appreciate the technical legal assistance I received from Mr. Melvin Wiviott and Mr. Robert Wehrle-Einhorn of the Contract Law Department of AFIT, and I thank Major Curtis Cook, my reader, who provided direction early in the research process.

Finally, I thank my husband [REDACTED] for his support, understanding, and encouragement during this research effort.

Diane L. Bowden

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Abstract

The purpose of this study was to examine and qualify Air Force service contract cases appealed to the Armed Services Board of Contract Appeals. The study had three basic objectives: (1) Determine what types of service contracts are most likely to have disputes appealed to the ASBCA. (2) List the cases and claim categories and examine cases of the predominant claim categories of the cases appealed. (3) Determine what lessons might be learned from the cases appealed.

The study found that the services with the most appeals during the five year time period included Housekeeping and Base services; followed closely by Transportation and related services; and Maintenance, overhaul, repair, and modification of systems, supplies, and equipment. The predominant claim categories included Interpretation of Contracts, Changes, and Board Procedures.

The lessons to be learned from the cases range from the use of better communication between government personnel and the contractor, more care should be exercised in the preparation of specifications, and performability reviews might be conducted to ensure the specifications and requirements provide a sound basis for performance.

AN ANALYSIS OF AIR FORCE SERVICE CONTRACT CASES  
APPEALED TO THE ARMED SERVICES BOARD OF CONTRACT APPEALS

I. Introduction

This work is a descriptive study, analyzing seventy-four service contract cases appealed to the Armed Services Board of Contract Appeals (ASBCA) during a five year period from 1983 through 1987.

Contract disputes are a serious problem for the Air Force. A major problem is the amount of administrative time spent by contracting officers (COs) in preparing final decisions and gathering supporting evidence for cases appealed to the ASBCA. Sometimes a dispute causes disruption of services, as in the termination for default situations. Adversarial relationships may develop between government and contractor personnel, causing stress and tension, making a good working environment more difficult to maintain. These are only a few of the negative aspects of disputes in the administration of contracts.

In light of this, something can be learned from the claims that have been appealed to the ASBCA. The claims that are filed with the ASBCA are by no means all of the claims filed. Most claims that are filed are settled at the CO level. Research at this level would be very useful, but would require examination of actual contract files at

contracting activities. This could not produce all claims filed because of the time limits set for destruction of these files and the lack of a data gathering system to track all claims. On the other hand, research of the cases appealed to the higher courts would not be as plentiful and would not provide as broad a data base for making conclusions about claims filed against the government. Therefore, the ASBCA level of the disputes process was chosen to examine why claims are filed, what can be learned from them, and what can be done to avoid disputes in the future.

#### The Air Force Service Contract Process

A service contract is a legal agreement whereby a contractor is hired to perform a specific service for the government at a specified level of performance. Two primary methods of specifying are used for service contracts. A Performance Work Statement (PWS) "describes, accurately, the essential and technical requirements for items, materials, or services, including the standards used to determine whether requirements have been met" (11:1-2). A Statement of Work (SOW) describes in detail what must be done. Measurement standards must be applied to ensure that performance meets the minimum needs of the government.

The method for evaluating the performance for PWSs was changed on 12 August 1987 by change 6 to AFR 400-28. Prior to that date, the Acceptable Quality Level (AQL) method of indexing was used to determine the variance from the required

standard and at what point the service would be considered unacceptable and rejected. After that date, the performance requirement is determined by the Indifference Quality Level (IQL) method of indexing. Although the change occurred during the period from which the cases were taken in this study, the PWS contracts were all awarded and performed under the AQL method of evaluation. The measurement standards and inspection criteria must be a part of the contract so that the contractor knows how he/she will be evaluated and at what point the service is considered unacceptable (11:1-2).

The service contract process begins with the using activity submitting a purchase request to the contracting activity. This request can be in the form of a PWS as described earlier, or a SOW for a particular service. The contracting personnel often work closely with the using activity to write the PWS/SOW to ensure it complies with all the mandatory provisions in AFR 400-28 or applicable Major Command regulations. Depending on the estimated dollar amount of the contract, the contracting activity review board examines the solicitation to ensure the contract, when awarded, will be sound. This may include a legal review if determined necessary by the CO. After the bidding or negotiation process is complete and award is made, the Administrative Contracting Officer (ACO) and the Quality Assurance Evaluator (QAE) become the primary personnel in direct contact with the contractor. The Notice of Award is issued and the contractor begins performance.

### The Dispute Process

During the performance of a contract, if the contractor believes the government is requiring performance beyond the contract specifications, a claim can be submitted to the CO for compensation for the extra work. The CO can concur and compensate the contractor, negotiate a settlement with the contractor, or deny the claim. If the CO denies the claim, he/she must issue a final decision within 60 days of the contractor's submission if the claim is for \$50,000 or less. If the claim is for more than \$50,000, the CO has 60 days to issue a decision or give the contractor a date when the final decision will be rendered. If the decision is not satisfactory to the contractor, he/she can appeal this decision to the ASBCA or the Claims Court (see figure 1) (7:16-4-5).

Over the years the procedures for filing claims and appealing the COs final decision have evolved to the present state where we have the Contract Disputes Act of 1978. The contractor can choose to appeal by way of different rules.

. . . depending on the value of the claim, the contractor may elect to accelerate the decision. If the claim value is \$10,000 or less, the contractor may request the small claims procedure. This results in a board decision within 120 days; however, decisions under this procedure are not appealable. If the claim is valued under \$50,000, the contractor may select accelerated procedures and the decision is rendered within 180 days. Claims valued at greater than \$50,000 cannot be accelerated, and the board's case load may extend the period for the decision [6:16-18].

This improvement in the process may provide more contractors with an avenue of relief that they previously considered too expensive or time consuming.

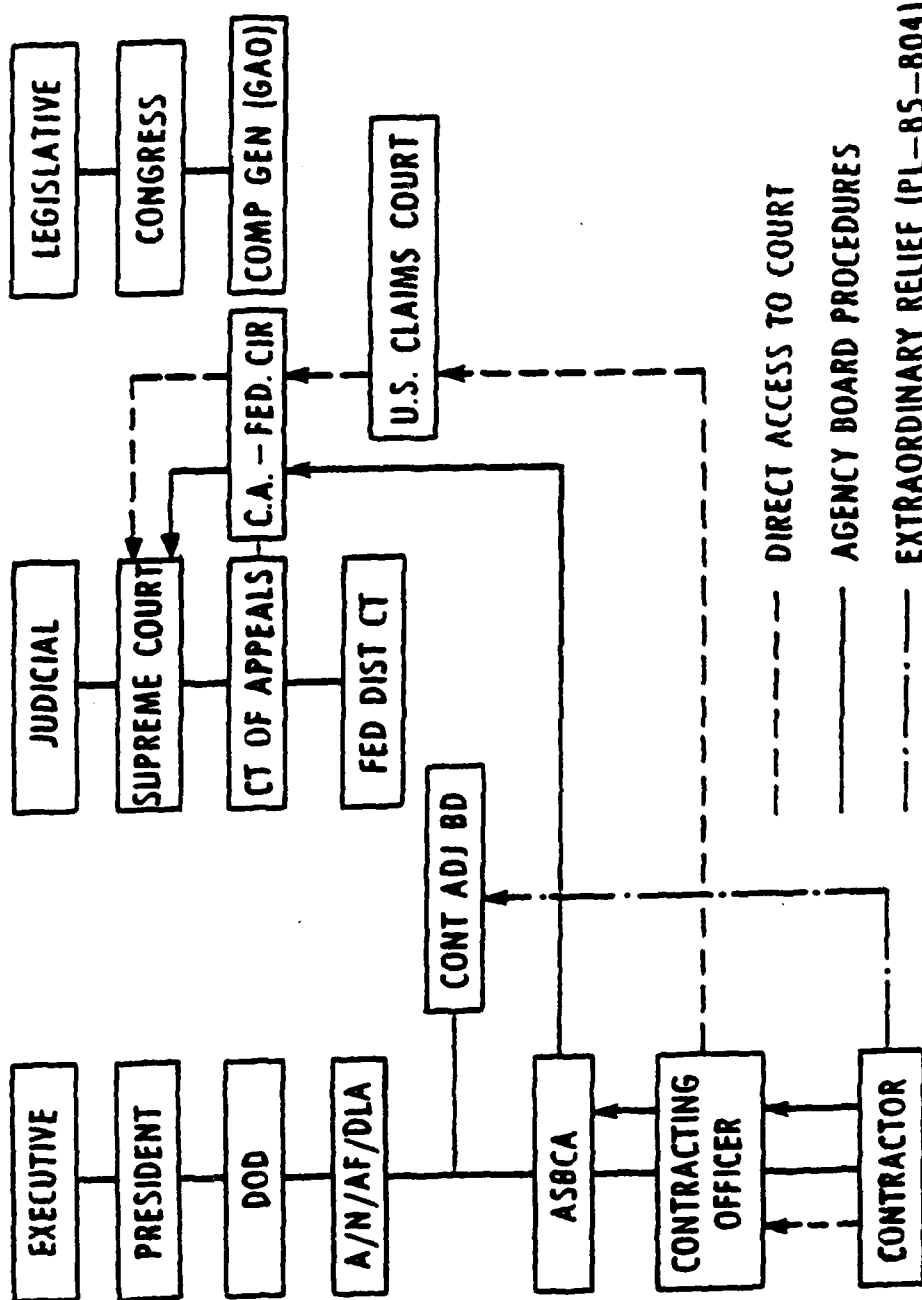


Figure 1. Roadmap of Contractor Remedies

(8:E-2)

The ASBCA operates under the authority of the Contract Disputes Act of 1978. Its 33 members are appointed by the Department of Defense. A chairman and two vice chairmen are appointed by the Under Secretary of Defense and three assistant Secretaries of the Armed Services. The other 30 members form ten divisions of three members each, with one member designated as head of the division. The Board is supported by 22 staff personnel which include military attorneys, legal assistants, clerks, and recorders. The General Accounting Office (GAO) reviewed the ASBCA and its ability to make decisions, independent of influence by either the Department of Defense or contractors (12:2). The GAO found that

While DOD appoints the Chairman, Vice Chairmen, and board members, we found no evidence that the Board was pressured or influenced in its decisionmaking. Furthermore, the Board is perceived to be independent by both private and government attorneys and contracting officials [12:6].

#### Key Variables

The disputed cases reveal important information about the contract that can be divided into areas to include the service contract features, the claim categories, pertinent facts, and decisions (8:12-13).

Contract Features. This area identifies the type of work for which the contract was awarded, the base for which services were provided, the dollar amount of the contract, and the type of work on which the claim was filed (8:12-13).

Claim Categories. The claim categories identify the problem that caused the contractor to file the claim.



Whether the claim is sustained or denied does not enter into this area, but identifies only what the contractor considered the problem to be in his/her particular situation (8:12-13).

Pertinent Facts. The pertinent facts are some extenuating factors present during the performance of the contract that could cause the contractor to file a claim. These may also be interjections of the climate of the relationship between government personnel and the contractor or his personnel (8:12-13).

Decisions. The decisions that the ASBCA must render are for entitlement (who wins), or quantum (how much), or both entitlement and quantum. Cases are sometimes decided for entitlement and remanded to the parties to determine a quantum settlement.

#### Research Problem

Loss of contracted services and the time required to resolve issues due to disputes is a concern for Air Force base commanders and contracting personnel. Some disputes may be avoided if contracting and technical personnel could identify high risk contracts or contractors and take action necessary to avert problems in the future. Examination of ASBCA disputes cases and their causes may afford this ability.

#### Investigative Questions

1.) What types of service contracts are most likely to have disputes arise that are appealed to the ASBCA?

2.) What are the predominant claim categories and issues of the cases that are appealed to the ASBCA?

3.) What lessons can be learned from the cases that have been decided by the ASBCA?

#### Scope and Limitations

The study is intended to be of assistance to Air Force personnel in recognizing potential problem contracts and in avoiding future disputes. The scope of the study is limited by the following criteria:

1. The number of cases examined was 74.
2. The case years include 1983 through 1987.
3. Only service contract cases at the ASBCA level were examined.
4. Only Air Force cases within the United States and Canada were examined.

## II. Literature Review

### Introduction

The problem of contract disputes is one that has interested a number of people over the years. Each individual or team that has done research in this area has taken a different approach when analyzing the data, although expectations for an end result were not that different. Each was trying to gain insight into the problems of the past to provide a measure of prevention or improvement of the process for the future.

### Discussion

In their studies, some have attempted to determine whether common relationships existed between a multitude of factors in disputed cases (8). Others examined prevalent factors, terminations for default, termination conversions, disputes concerning warranties and small contractor claim procedures (10:5-9). Yet others have examined cases to determine whether the procedures for disputing claims were consistent and fair for the contractor and the government alike (10:7-9, 11).

The only literature that was similar to the present study was a series of articles in which the author discusses specifications in regard to the governments' and the contractors' responsibilities concerning them. The articles differed from the present study in that they included all

types of contracts (construction, supplies, services) from appeals to all levels of the procedure (Federal Claims Court, all Boards of Contract Appeals), with no specific time period specified (1)(2)(3). The present study is more focused to include only Air Force service contract disputes appealed to the ASBCA from 1983 through 1987.

### Summary

The studies of the past have, for the most part, been quantitative analyses of many factors and variables within the disputes process and cases that have been appealed to different levels of the process. Decisions by the ASBCA and Claims Court form a basis of "case law" that provides insight in the learning process for the preparation, award, and administration of contracts.

### III. Methodology

#### Method of Case Selection

The West Law data base was accessed to obtain information for selection of cases to be analyzed. West Law is a service provided by West Publishing Company. It is an electronic method of research available for use by attorneys in preparing cases. The company publishes court decisions and board of contract appeals cases, along with footnotes and headings, and provides cross references to make the legal search procedures less time consuming. A search of the West Law data base using the key words CONTRACT, SERVICES, and USAF provided 1057 documents. A determination was made to select cases from the most recent five year period to have a more manageable number of cases for analysis. This five year time period included 83 cases, although when individually analyzed, only 36 were actually USAF service contract disputes. Recognizing the limitation of the key words, a case-by-case analysis was done on a randomly selected Board of Contract Appeals (BCA) Decisions casebook (4). This provided several cases that were omitted by the West Law search. To ensure that all cases were obtained, a case-by-case search of all BCA casebooks for the period from 1983 through the 1987 case load was accomplished. The number of cases obtained by this method totaled seventy-four (see Appendix A). The BCA casebooks include copies of the pub-

lished decisions of the ASBCA and other Boards of Contract Appeals, written by the presiding judge in each case.

### Initial Analysis

After the selection process was completed, an initial analysis of the cases was accomplished to determine the claim and issue appealed in each case. The cases were listed by the type of service provided, a cross reference number to Appendix A, ASBCA number, an acronym of the appellant party, and claim categories and issues (see Appendix B). The classification of services was determined by FAR 37.101a through j, as follows:

- a. Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems or equipment.
- b. Routine recurring maintenance of real property.
- c. Housekeeping and base services.
- d. Consulting services.
- e. Engineering and technical services.
- f. Operation of Government-owned equipment, facilities, and systems.
- g. Communications services.
- h. Architect-Engineering.
- i. Transportation and related services.
- j. Research and development [5:37.101a-j].

The cases with their respective claim categories and issues were listed to provide a means of easily locating all cases with similar claims. The claim categories and issues were taken from the headings of the summaries at the beginning of each case. The summaries basically described the pertinent facts and decisions of the case.

### Lessons Learned

Twenty-eight of the 74 cases were examined, two of which

were used more than once. Those cases with similar claim categories were selected and analyzed to determine what lessons might be learned for that claim category. Each case in the category was summarized, the common dispute analyzed, and the decision examined to determine what precedent cases might be cited or what point of law or regulation weighed heavily in the ruling. Not all cases in the population fit the claim categories selected for analysis, and therefore, some are not included in the research findings.

#### IV. Research Findings

##### Discussion of Findings

Each of the case summaries is listed by the ASBCA case number, appellant name and the Appendix A and B reference number. This facilitates location of either the case in the Board of Contract Appeals Decision volumes (Appendix A), or the complete listing of claim categories and issues in each case (Appendix B). When direct quotations are used, the Bibliography citation and page number are given.

##### Statistical Analysis

Research Objective 1. The types of service contracts most likely to have disputes appealed to the ASBCA.

A summarization in a simple statistical analysis is provided to show how the disputes were distributed over the types of services provided as follows:

"a. Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems or equipment" (5:37.101a).

Thirteen of the 74 cases, (17.6%) came under this category and include actual cases for overhaul of diesel generators; shot peening of aircraft; vehicle overhaul; clock maintenance; lease and maintenance of word processing equipment; overhaul of aircraft parts and instruments; repair and maintenance of refrigeration equipment; and rebuild and repair of specialty vehicles.



"b. Routine recurring maintenance of real property" (5:37.101b).

Eight of the 74 cases, (10.8%) were for maintenance of military family housing.

"c. Housekeeping and base services" (5:37.101c).

Twenty-seven of the 74 cases, (36.5%) came under this category and include such services as mess attendant; commissary shelf stocking/custodial; grounds maintenance; custodial; refuse collection; and contaminated soil disposal.

"d. Consulting services" (5:37.101d).

Five of the 74 cases, (6.7%) were of this category which include audit and tax consulting; other consulting services; medical transcription; and technical order writing and revision services.

"e. Engineering and technical services" (5:37.101e).

There were no engineering and technical service cases appealed to the ASBCA during this time period.

"f. Operation of Government-owned equipment, facilities, and systems" (5:37.101f).

Six of the 74 cases, (8.1%) included services such as transient alert service and support equipment maintenance; operation, maintenance, and support of Missile Early Warning Station; Audio Visual services; operations and maintenance services at a Production Flight Test Installation; and management, operations and maintenance of a Publications Distribution Office.

"g. Communications services" (5:37.101g).

No communications services contracts were appealed to the ASBCA during the five year time period.

"h. Architect-Engineering" (5:37.101h).

Two of the 74 cases, (2.7%) were Architect-Engineering service contracts.

"i. Transportation and related services" (5:37.101i).

Thirteen of the 74 cases, (17.6%) included a range of services such as bus services; vehicle maintenance, operation, and transportation analysis; moving and storage of household goods; and aircraft leasing.

"j. Research and development" (5:101j).

There were no research and development contract cases appealed to the ASBCA during this time period.

Table 1 is a listing of the number and percentage of the cases by service type in decending order. The Table shows the total number and percentage of cases against the total number of service cases appealed to the ASBCA during the five year time period. It cannot be concluded, however, that Housekeeping and Base service contracts have more claims and appeals filed compared to all service contracts written. The only way to make those kind of conclusions would be to ascertain the percentage of claims filed and appealed compared to the number of contracts awarded in each service type.

TABLE 1  
Cases by Service Type

Type of Service	# of cases	% of cases
Housekeeping & base	27	36.5
Transportation & related	13	17.6
Maintenance, overhaul, etc. of systems, supplies, equipment	13	17.6
Routine recurring Maintenance of real property	8	10.8
Operation of Gov't owned equipment, facilities, or systems	6	8.1
Consulting	5	6.7
Architect & Engineering	2	2.7
Engineering & Technical	-	-
Communication	-	-
Research & Development	-	-
TOTAL	74	100.0

Research Objective 2. The predominant claim categories and issues of the cases appealed to the ASBCA.

The claims and issues were many and varied. The most prevalent claim categories and issues are listed in descending order in Table 2. The listing includes only the broad categories and have many subcategories for each main category, such as, Interpretation of Contracts - Clear Meaning, Contract as a Whole, Preaward Communications, and Duty to Seek Clarification to name only a few. Many of the cases were constituted of more than one claim, sometimes closely related to another, making distinction of the claims more difficult. The main categories chosen for analysis are some that are likely to be of concern to COs and contract management personnel in their daily work environment. Many of the

claims not specifically cited may be included, merely because the case examined was a multiple claim case and dealt with more than one issue.

TABLE 2  
Claim Categories and Issues

Claim or Issue	Frequency
*Board Procedure	28
Costs (14 from one case)	21
*Interpretation of Contracts	18
*Changes	16
*Performance	11
*Reprocurement	7
Defaults	7
Pricing of Adjustments	6
*Indefinite Quantity Contracts	5
Payments	5
Property	5
Mistakes	3
Award	3
Options	3
Delays	1
Interest	1
*Specifications	1
Breach of Contract	1

\*claim categories from which cases were chosen

Research Objective 3. Lessons that can be learned from the cases that have been decided by the ASBCA.

To facilitate a lessons learned section, a claim category was chosen, cases within that claim category analyzed and summarized, and the Board decision noted. Following a selection of cases by claim category, lessons we can learn or preventative measures that could have been taken to avoid the dispute are discussed. See Appendix C for finality of ASBCA

Decisions.

### Interpretation of Contracts

This is one of the leading reasons contracts are disputed. The government prepares a solicitation, receives offers, evaluates them, and awards a contract.

One method of offer and award is by sealed bids. Sealed bids are required if:

- (1) Time permits the solicitation, submission, and evaluation of sealed bids;
- (2) The award will be made on the basis of price and other price-related factors;
- (3) It is not necessary to conduct discussions with the responding offerors about their bids; and
- (4) There is a reasonable expectation of receiving more than one sealed bid [5:6.401(a)(1)-(4)].

If the bidder did not fully understand the scope of the work and underbids, and if the bid is not low enough for the CO to suspect a mistake in bid, the potential exists for a claim once the award is made and performance begins.

Competitive proposals may be requested if sealed bids are not appropriate under one of the four requirements for sealed bids. Proposals are received, the competitive range is determined, discussions with each offeror within the competitive range may take place, and an award is made. An award can be made without discussions if the government so determines. This procedure provides the opportunity for discussion and better understanding on the part of the contractor, and should lead to fewer claims because fewer ambiguities should exist after discussions.

The solicitation normally provides for a site visit and

prebid conference to familiarize potential contractors with requirements and to allow for explanation or clarification of complex specifications. Even after such precautions are taken, many contracts are disputed because the contractor feels what is being required is beyond the scope of the contract. He then asks for some modification of the contract or files a claim with the CO for compensation for the extra work.

Included for discussion in this section are appeals involving Interpretation of Contract as a Whole; Duty to Seek Clarification and Clear Meaning; Preaward Communications and Failure to Inspect; and Interpretation During Performance. A summary follows concerning steps which may have been taken to avoid those disputes and lessons we can learn from those cases.

ASBCA No. 34493 Logistical Support, Inc. - 4

Issue: Contract as a whole - Extensions

Relevant Case Information: In the case of Logistical Support Inc., the government unilaterally extended the contract for three months after the two option years had been exercised. The contractor claimed that the government exhausted its right to extend by exercising the two one-year options. The option clause stated in part, "the total duration of this contract, including the exercise of any option under this clause, shall not exceed 3 (three) years" (4:101425).

Board Decision: The Board determined the government had

exercised its' rights within the language of the contract. The original contract period was 8 1/2 months, therefore the government had 3 1/2 months it could extend in not less than one or more than three month increments. If the two one-year options had exhausted their right to extend, the rights under the maximum three year term would have been violated. The appeal was denied.

ASBCA NO. 26338 P.J.K. Food Service Corporation - 69

Issue: Contract as a whole - Meaning to every part

Relevant Case Information: P.J.K. Food Services Corporation, submitted a claim for adjustment in its contract price for cleaning of a salad-vegetable preparation room and a kitchen wall which it contended were not provided for in its Mess Attendant Services contract. Although the contract drawings did not indicate a wall separating the dining area from the kitchen, a site visit attended by the contractor, apprised him of the existing conditions. The contractor cleaned the entire area for over a year without objection to the requirements. The contract obligated the contractor to clean the entire dining hall, which, reading the contract as a whole, includes the salad-vegetable preparation room and the wall in question.

Board Decision: The contractor was not entitled to extra compensation for cleaning the salad-vegetable preparation room and kitchen walls which was clearly a requirement of the contract. The appeal for additional compensation was denied.

ASBCA No. 27064 Harold Bailey Painting Company - 13

Issue: Contract as a whole - Emergencies

Relevant Case Information: In a Military Family Housing Maintenance contract, appellant, Harold Bailey Painting Company, appealed for an equitable adjustment to the contract price for an excessive amount of service calls the government classified as emergencies. The government required all service calls for air conditioning and heating be answered on an emergency basis. This meant response was to be accomplished within one-half hour for the calls, which made it necessary to have an emergency response team available both at Maxwell AFB and Gunter AFB to meet this requirement. In classifying all heating and air conditioning calls as emergency, the government ignored the definition of emergency within the contract, "a situation that presented a health hazard or threatened damage to property". Within that definition, not all heating and air conditioning problems would be considered emergencies.

Board Decision: The contractor was entitled to an adjustment for the extra expense incurred because of the apparent constructive change made by the government.

Interpretation of Contract as a Whole - Lessons Learned.

In the contract with Logistical Support, Inc., the government only required what was written in the contract. The government could not have expected a dispute of the extension for three months. This is support for the fact that, no matter



how careful the preparation has been, there is always room for communication between the parties to clarify and discuss details.

When reading the contract as a whole P.J.K. Food Service Corporation clearly was required to clean all areas of the dining hall. The government could have made certain all areas were included in the diagram, and the specifications could have clearly stated the specific requirements as well.

In the Military Family Housing Maintenance contract the government personnel making the determination of emergency, urgent, and routine calls did not have a full understanding of the contract requirements. The contract clearly stated the definition of each type of call, yet was not adhered to, causing the dispute and subsequent award of additional compensation to the contractor. All personnel involved in the execution of contract requirements should be intimately familiar with the specifications of the contract.

Duty to Seek Clarification/Clear Meaning

ASBCA No. 26338 P.J.K. Food Service Corporation - 69

Issue: Duty to Seek Clarification - Reasonableness of

Contractor's Interpretation

Relevant Case Information: P.J.K. Food Service Corporation appealed for compensation for extra personnel required to perform pick-up and delivery of subsistence items from the commissary to the dining hall. The specifications stated in part:

The contractor is responsible for:

b. Loading and off-loading subsistence items and other supplies delivered to the dining hall. Contract personnel shall bring the off-loaded items to the storage area and store items as indicated by the supervisor in charge [4:83229].

Nowhere in the specifications did it indicate contractor personnel would be working at the commissary or any food warehouse nor a requirement that contractor personnel accompany government personnel to load such supplies. The government contended that the contractor had the duty to seek clarification of the specifications because of the "Loading and off-loading" statement.

Board Decision: The contractor was entitled to an equitable adjustment because its' interpretation of the contract was reasonable and as such would not necessarily seek clarification.

ASBCA No. 24398 Lewis Management and Service Company - 51

Issue: Duty to Seek Clarification - Patent Ambiguity

Relevant Case Information: The food services contractor, Lewis Management and Service Company, appealed for an adjustment to its' contract price due to excessive food preparation required by the government. The specification stated that minor food preparation was required but then went on to specify numerous tasks which included panning of meats. This caused differing opinions among three contractor management individuals as to what was required when preparing their bid. Rather than seek clarification they erroneously interpreted the specification as panning of breakfast meats only,

and learned the true meaning during performance. There were numerous other specifications that read "as required" and "as specified" which the contractor chose to disregard rather than ask for concise meaning.

Board Decision: The Board found that the specification was so patently ambiguous that the contractor had a duty to seek clarification of the requirements to determine what should be expected. The appeal was denied.

ASBCA No. 31925 Structural Finishing, Inc. - 31

Issue: Clear Meaning - Contractor Responsibility

Relevant Case Information: Concerning a Family Housing Maintenance Contract, appellant, Structural Finishing, Inc., filed an appeal for reimbursement of the unpaid amount for 87 automatic dishwashers it had replaced during the life of the contract (40 months). Section 3.5 of the Statement of Work states "Replacement of built-in dishwashers shall be provided by the Contractor" (4:95730). Section 4.2.2 provides a \$50.00 deductible arrangement, wherein the government pays costs in excess of \$50.00 and provides an example for clarity:

Item Cost	\$98.00
Contractor pays	50.00
Government pays	48.00 (4:95730)

Included in this claim was the amount unpaid over \$50.00 for three disposal units each costing \$51.89. The government had no records of paying the 1.89 for each of the disposals, amounting to \$5.62.

The contractor had completed the contract 2 1/2 months before it presented this claim to the contracting officer. During the entire 40 months of the contract, the contractor bore the \$50.00 deductible cost without objection to the arrangement.

Board Decision: Reading the contract as a whole, the contractor cannot ignore Section 4.2.2 which clearly states the contractor's responsibility. The appeal was denied, except for the \$5.62 excess over the \$50.00 deductible for the disposals.

ASBCA No. 30574 Aldi Corporation - 2

Issue: Clear Meaning - Actual Cost

Relevant Case Information: Aldi Corporation was awarded a contract to overhaul and recondition diesel generators. The specifications indicated that "reimbursement for parts would be limited to 'actual cost plus transportation'" (4:102906). When submitting their first invoice, Aldi included charges for administrative costs for ordering parts which the government disallowed. Aldi Corporation also submitted charges for rental of a forklift, also disallowed by the government because a separate line item for such expenses was not included in the contract. The government made a motion for summary judgement on both appeals.

Board Decision: The Board decided in favor of the government on the claim for reimbursement of office expenses because the preproposal conference question and answer about the "actual

cost plus transportation" made the intent of the government very clear. On the question of the forklift rental, the board felt there were unresolved issues and ordered the parties to confer and decide on a date for further hearings to allow for discovery on the remaining issue. The government could not be granted summary judgement on this issue.

Duty to Seek Clarification/Clear Meaning - Lessons Learned. The mess attendant service contract required contractor personnel to load and off-load food supplies, but did not state clearly that personnel would be required to accompany government personnel to the commissary. A simple statement of this requirement could have prevented the claim and subsequent adjustment to the contract price.

Although the Board found for the government in the appeal by Lewis Management and Service Company, time in preparing the case was administratively costly. The government should have been more specific in its terms throughout the contract to prepare the contractor for what was actually required of him during performance. When the government wins the case because the specifications are patently ambiguous, it should serve as a warning that more time should be spent on clarifying the terms of the requirements.

In the Military Family Housing Maintenance contract, the government should have been more diligent in payment for costs that exceeded the \$50.00 deductible concerning the

disposals. This would have provided consistency over the entire contract, rather than failing to pay on small amounts, giving the contractor reason to believe the larger items may have been overlooked, as well. The contract was very clear in meaning; a more thorough presentation at a preperformance conference may have avoided conflict where division of responsibility for payment was concerned.

The government made clear what it intended in the generator overhaul and reconditioning contract concerning the allowable costs, not only in the specification, but in the pre-bid conference as well. The other claim was not as clear to the Board; the parties were ordered to provide more information for another hearing on the forklift issue.

Preaward Communications/Failure to Inspect

ASBCA No. 31093 D.S. Agency - 22

Issue: Preaward Communications - Proposal Details -  
Interpretation During Performance - Consistent  
Modifications

Relevant Case Information: In a contract for lease and maintenance of word processing equipment, D.S. Agency appealed for additional payment for the maintenance of the equipment installed. The buyer awarded the contract for lease and maintenance of the equipment with full intention that the contractor be paid separate amounts for the lease and maintenance charges. The contract administrator interpreted the contract specifications differently and

modified the contract to delete the payments for the maintenance charge, with the understanding that the separate maintenance charge was only to occur if the purchase option were exercised.

Board Decision: The Board decided for the appellant mainly because of the way events transpired. The buyer initially intended separate charges for lease and maintenance.

Modifications 1, 2, and 3 resulted in that same conclusion.

When a change in the contract administrator brought a result other than what had been consistently done to this point, the contractor filed the claim and subsequent appeal. The appeal was sustained and remanded to the parties to negotiate a quantum settlement.

ASBCA No. 28668 Airtech Precision Shot Peening, Inc. - 10

Issue: Preaward Communications - Prebid Conference

Relevant Case Information: Airtech Precision Shot Peening

Inc. entered into a contract with the Air Force for shot

peening services on C-141 aircraft. During a prebid

conference the prospective bidders were shown the areas to be

worked and the specifications designated those areas by

Flight Station numbers, FS 734, etc. At the conference, the

contractor that ultimately won the award asked whether cables

and pulleys in the area would be removed prior to perfor-

mance. The government representative stated that they would

be left in place. The contractor expressed concern, but the

government insisted that the work had been done before with-

out removal and was entirely possible to complete the work satisfactorily. After award of the contract, Airtech determined that more effort was required with the cables and pulleys in place, and filed a claim with the contracting officer and ultimately appealed to the ASBCA. The contractor felt that the governments' refusal to remove the cables and pulleys required them to do more extensive shot peening, masking, and cleanup work than it anticipated when it bid on the proposal, and in effect, breached the contract.

Board Decision: The Board found that the job was possible as stated in the specifications; the government continued with the same work after the expiration of Airtechs' contract.

Airtech used inexperienced personnel to do the work and the government, in an effort to help Airtech complete performance even relaxed the standards required by the contract. Airtech was well aware of what the government expected because the question was asked by them at the prebid conference and the government made the requirements very clear. The appeal was denied.

ASBCA No. 30643 Structural Finishing, Inc. - 44

Issue: Failure to Inspect - Site Conditions

Relevant Case Information: Structural Finishing, Inc. (SFI), in its' Military Family Housing Maintenance contract, was responsible for maintaining air conditioning units in 414 residences in three different areas of the base. SFI did not attend the prebid conference or the site visit that was urged



by the solicitation. Instead, SFI assumed that "central air conditioning" meant one unit per residence, that is, 414 units to be serviced and maintained. In reality, some of the buildings had been renovated which consolidated two residences into one, leaving more than one air conditioning unit in some residences. A site visit would have made this fact known to the contractor. Upon discovery of this, after award of the contract, SFI sought to have the contract price changed to include the 100 units not planned for in its bid. The CO denied the claim and SFI appealed to the ASBCA. Board Decision: The Board found that SFI failed to take every opportunity offered to it to become familiar with the specifications and therefore was at fault in not knowing information that was "reasonably obtainable" from a site visit. The appeal was denied.

Preaward Communications/Failure to Inspect - Lessons Learned. The government could have avoided the dispute in the lease and maintenance of the word processing equipment simply by better communication between the buyer and the contract administrator. The ambiguity of the requirement between what the buyer intended and how the administrator interpreted the stated requirement caused the problem. When the administrator first assumed responsibility of the contract, this area should have been clarified and modified if necessary to provide clear meaning.

The government clearly stated the requirements for the shot peening operation, both in the contract and at the

prebid conference. The government relaxed requirements in an attempt to help the contractor complete the contract. The concern expressed by the contractor at the prebid conference might have been a warning to the government that the contractor felt the work was not possible.

Although the government prevailed in the dispute in the Military Family Housing Maintenance contract, the dispute may have been avoided completely. Noticing the low bidder had not attended either the prebid conference or the site visit, special precaution could have been taken by performing a Preaward Survey (PAS). A thorough PAS could save award to an unqualified contractor, or at least show areas of weakness in his bid or plan for performance of the contract, such as low manning levels, expected materials requirements, etc.

#### Interpretation During Performance

ASBCA No. 25070 Dyneteria, Inc. - 64

Issue: Interpretation During Performance - Conduct of Parties

Relevant Case Information: Dyneteria, Inc., a Mess Attendant services contractor, appealed after the CO denied his claim for compensation for extra work performed in assembling sandwiches. The contractor made a prebid site visit, observed sandwiches being assembled on the serving line, and when awarded the contract, performed in like manner during the three year duration of the contract. Only after the contract was complete did he notify the government of a claim

concerning sandwich assembly. He based his notification on a discussion which took place at a meeting held a year after performance began. The meeting was held to negotiate a modification to the contract. Dyneteria raised the issue as to whether the assembly of sandwiches could change the classification of line server to short order cook. The CO subsequently checked with the Department of Labor (DOL) for a reading which came back negative.

Board Decision: The Board found that the contractor denied the government the "opportunity to protect itself against additional costs that the appellant knew or should have known it was going to claim" (4:85487). Also, the contractor's conduct for the entire period of performance without complaint, agreed in effect that sandwich assembly was part of its' contract obligation. The appeal was denied.

ASBCA No. 30699 Thunder Corporation - 43

Issue: Contract Documents - Performance Requirements Summary

Relevant Case Information: In a Shelf Stocking services contract, Thunder Corporation appealed for compensation for work it considered beyond the scope of the contract. The contractor failed to "front" items on the shelves unless it stocked that item on a given day. The CO notified the contractor that all contractor responsible items were to be "fronted" daily whether stocked that day or not. The specifications for those tasks that were to be accomplished daily read as follows:

The contractor shall front and straighten all contractor responsible merchandise on the commissary shelves in the resale area [4:92499].

The contractor finally corrected the situation, but submitted invoicing for the extra work. The CO denied his claim and he appealed.

The contractor had another shelf stocking contract at another AFB for the year prior to this award. At that base the specification was exactly the same and performance was in conformance with no objections or claims.

Board Decision: The Board found Thunder Corporation's claim was without merit. The specifications were clear in meaning, and past performance by the contractor himself provided credence to this. The appeal was denied.

Interpretation During Performance - Lessons Learned.

Problems that arise during performance are likely to be noticed by the QAE or Technical Representative before the CO has knowledge of them. Therefore, it is important for such personnel to keep the CO apprised of the "working climate" and enable him to confront problems before they are submitted as a claim. Communication between the CO and the contractor on a regular basis may have avoided the claims of this section entirely. Unlike many of the cases the two from this section were comprised of only one claim each.

In the contract for mess attendant services, Dyneteria, Inc. did not give the government any notice that there was a problem until the claim was filed after completion of the contract. Without this knowledge, it was virtually impossi-

ble to prevent this claim. During negotiation, the discussions about the wage determination may have been an indication of problems, but without continuing discussion on the situation, the government obviously considered the matter closed. The government personnel working closely with the contractor may have had some indication that the contractor was not satisfied with the situation. This is one area where government personnel must act as the eyes and ears for the contract administrator.

Better communication between the parties may have been helpful on the shelf-stocking contract as well. The contractors' compliance on another contract with the same specifications at another base should have been convincing evidence that he would not win his appeal.

#### Specifications

Specifications are a very important part of any contract and are related very closely with interpretation of contracts. They must be prepared carefully to ensure the government states precisely what it needs, and then requires the contractor to perform by those specifications. If the government requires performance beyond the specifications, "a 'change order' entitling the contractor to an equitable adjustment in price in accordance with the 'changes' article in the contract" (7:8-4) occurs.

If the specifications are ambiguous and the interpretation by the contractor is something other than what the

government (the drafter) expected, the "ambiguities will be construed against the Government" (7:8-4). If ambiguity is obvious, however, the contractor has the responsibility to seek clarification.

ASBCA Nos. 24802, 24803, 24804 Lewis Management and Service  
Company - 46

Issue: Mistakes - Relief After Award - Reformation -  
Misreading Specifications

Relevant Case Information: In three shelf stocking/custodial contracts at three different AF bases, Lewis Management and Service Company appealed for reformation of defaulted contracts after its' claims were denied by the respective CO's. In each of the contracts, the contractor claimed he misread the specifications regarding the definitions of very important parts of contract performance - such as, stocking by dumping, tray packing, and fronting and straightening. Rather than make a site visit to any one of the Bases - Davis-Monthan, Langley, or Wright-Patterson, where the contracts were to be performed, appellant visited Offutt AFB to observe commissary activities which included "40-50% tray packing" (4:92439). He also "made a study of the surrounding grocery stores" (4:92439), and observed night stocking activities at an A&P grocery store, concluding that "a grocery store is a grocery store" (4:92439). He then based all three bids on the minimum wage rate and a maximum stocking rate for experienced personnel. The specifications

were very clear as to what was expected concerning all aspects of performance.

Board Decision: The Board determined that Lewis had exercised poor judgement in assuming that Davis-Monthan, Langley, and Wright-Patterson AFB conditions were identical to those at the Offutt AFB commissary or any other grocery store. Therefore, reformation of his defaulted contracts at higher prices was denied.

ASBCA No. 35578 Logistical Support, Inc. - 1

Issue: Estimates by Government - Negligent Preparation

Relevant Case Information: In a Mess Attendant Services contract, Logistical Support, Inc. filed an appeal for \$3800.90 for preparation of box lunches in support of an Operational Readiness Exercise (ORE). The contract period was from 1 January 1986 through 30 September 1986, and was subsequently extended through 31 October 1986. The ORE took place from 15 - 20 July 1986, for which the CO ordered the contractor to prepare 3412 box lunches which required additional personnel. The contract specifications provided for contingencies that could occur during the contract period, but nothing was mentioned about pricing box lunches separately from any other meals. A clause was included for a price adjustment if the actual number of meals served was less than 85% or more than 115% of the estimate. The contract also contained a clause providing for "periodic progress meetings" during which problems could be raised by

either the contractor or the CO. Nothing was mentioned during a meeting to suggest there was a problem with the box lunch requirement in July. The claim was first submitted a month after the contract was complete.

Board Decision: The Board found that both parties overlooked the possibility that box lunches could be significant enough to warrant special attention in their pricing. The appellant did not attend the prebid conference and failed to inquire about box lunches at the preperformance conference. No bidder in attendance at the prebid conference mentioned the box lunch requirement for consideration as a problem area. The Board did not fault the government for not making box lunches a separate line item and considered it in the variation in quantity provision as part of the risk that should be expected in this type of contract. The appeal was denied.

ASBCA No. 26860 Huff's Janitorial Service - 71

Issue: Estimates by Government - Negligent Preparation of  
Estimates

Relevant Case Information: Huff's Janitorial Service was awarded a contract to provide shelf stocking and custodial services for a base commissary. This was the first time these services for this base were contracted out. The contract included a 10% variation in quantity clause which provided for adjustment in price only for the cases which exceeded the 10% variance. When the 10% over the estimate was continually exceeded, a modification was negotiated to



establish the rate at which each case over the 10% would be paid. The first option year was exercised and a modification was negotiated to increase the amount to be paid for the excess quantities. The second option year was not exercised at the urging of the contractor, because, with the continual exceeding of the estimated amount, the contractor was operating at a loss. Two months before completion of the first option year, the contractor wanted to quit because of financial difficulties, but was persuaded to complete the full term by the CO. Less than a week after completion of the contract, Huff's presented a claim to the CO stating that the government error in estimating the number of cases to be stocked each month caused him to lose the money that it cost to stock 70,193 cases. This is the number of cases between 100% (30,000) and 110% (33,000) for which he could not be paid according to the variations clause. Of the 24 months of the contract, every month exceeded 100% and 22 months exceeded 110%.

Board Decision: The Board found that, in preparing its estimate, the government took an average of the number of cases stocked in 3 consecutive months during the winter of 1978. An additional 3,000 cases were added, given consideration that if the shelves were kept stocked, sales would increase. The government witnesses were very vague and could not say which months were used for the estimate or were certain whether it was from the beginning or end of 1978. A new commissary building was opened in January 1978, and

little consideration seemed to be given for the additional space it afforded as well. The Board cited the "Travis T. Womack, Jr., et. al. v. United States [12 CCF para. 81, 795], 182 Ct. Cl. 99 (1968)" (4:82080), which held that where the government estimate is negligently prepared, the variation clause did not apply. Therefore, the appeal was sustained and was remanded to the parties for negotiation of an equitable adjustment.

Specifications - Lessons Learned. The most technically knowledgeable personnel should be involved in preparation of the specifications to ensure the most accurate data available is included in the requirements. If the requirement is such that estimates are expected to change, allowances should be made for these changes, or use of an indefinite quantity contract might be considered if estimates are not quantifiable. If changes in quantities occur during performance, a new requirement might be the proper way to provide for these changes.

In the shelf-stocking/custodial services contract, the researcher felt the government knew the requirement estimates were not fair to the contractor after performance began, but considered its' hands tied by the contract and regulations. Modification of the quantity would have been outside the scope of the contract and would have required a new acquisition to encompass the greater quantity. The terms of the contract allowed them to require performance by the contractor.

In the case of negligent preparation of specifications, case law may indicate that the contractor cannot be injured by a mistake made by the government and must be compensated for the extra work.

#### Interference by Government

Interference in the performance of a contract is one area that all government personnel must avoid. The CO, QAE, Project Engineers, Technical Representative, and Inspectors, must exercise care in their transactions with the contractor or contractor personnel to avoid delaying or causing work stoppage. If the contractor has reason to believe government personnel caused a slow-down or work stoppage, a claim could be filed for an extension of his contract. If the contractor defaults the contract, he may claim that interference by the government was the cause, and avoid termination costs because of this situation.

ASBCA No. 24803, 24804, 24802 Lewis Management and Service  
Company - 46

Issue: Government Act Excusing - Interference - Isolated  
Occurrence

Relevant Case Information: In three shelf stocking/custodial services contracts at three different bases for the same time period, Lewis Management and Service Company claimed the government interfered in its work, delayed workers by double pricing case goods, failed to furnish equipment specified in the contract, and required workers to bale vendor cardboard.

The interference claim consisted of the QAE reminding workers to dust the shelves before stocking, which is within reason to do, rather than wait until shelves are stocked and not dusted. The double pricing would occur when prices changed and the new price markings were not placed over the old ones on case goods, requiring the stockers to request a price check from the QAE. The government failed to provide floor cleaning equipment specified in the contract, some stocking carts were not available, and not all pallet jacks were in good repair at all times.

Board Decision: The Board found that although these inconveniences happened, the contractor said himself that they "worked around" the lack of equipment. The Board decided that the incidences of interference and double pricing were isolated occurrences and may have slowed down the contractor occasionally, but were not major enough to consider the government at total fault in the performance collapse. The baling of vendor cardboard by contractor personnel was found to be voluntary and the lack of equipment for periods of time was not cause for material breach of contract. The three claims for reformation and breach of contract were denied.

ASBCA No. 31078 Nelson Energy Enterprises - 14

Issue: Performance - Interference by Government - Failure to  
Assign Available Work

Relevant Case Information: In a contract award for heat

reduction services, the contractor appealed for an equitable adjustment because of the government's failure to assign available units. The contract was awarded in October and included an exclusionary period from 1 November through 1 May during which time the contractor was not required to work. At the preperformance conference, Mr. Nelson informed the government that his intention was to work during that period and asked that units be assigned. When the first occupied units were assigned, tenants were not cooperative with the contractor, so he vacated those units without performing. He requested only vacant units be assigned if possible, and made daily visits or phone calls to check availability of units for work. Company personnel were housed in a rented cottage near the base during the entire period, to be available for work when units were assigned. Only twelve units were assigned during the period in dispute from 9 February through 20 March. The government contended that the contractor had not given written notice of his willingness to work during the exclusionary period as required in the contract, so therefore, the government was not required to assign available units.

Board Decision: The Board determined that the contractor had made his intentions to work during the exclusionary period very clear by his statements at the preperformance conference and by the continual visits and phone calls to the base, requesting the availability of units. The government had a haphazard method of determining which units were

available, and were surprised by evidence made available at the hearing that 58 units were in fact available during the disputed period. The appeal was sustained and remanded to the parties to negotiate a quantum settlement.

Interference by Government - Lessons Learned. In the shelf-stocking/custodial services contract, Lewis Management and Service Company may have prevailed in its' appeal, had it documented times and the number of occurrences when the equipment was not available for use, the number of price checks that were required each night, and the length of time expended by each one. The government should have made certain all equipment specified in the contract was available for contractor use.

The government failed to have a method for determining what units were available for assignment to the contractor for work in the heat loss reduction contract. There should have been a clear procedure for contract management personnel to follow in determining available units prior to award of the contract. This would have kept a steady flow of units available to the contractor.

#### Changes

Modifications are provided for and authorized by the "changes" clause of the contract. When the governments' needs change, the contract may be modified. The modification can be unilateral - signed only by the CO, or bilateral - signed by the CO and the contractor.

Another type of change is a "constructive change",

. . . an oral or written act or omission by the Contracting Officer or other authorized Government official which is of such a nature that it is construed or inferred to have the same effect as a formal written change order under the changes clause" (7:10-9-10).

Some areas that cause problems are those where conditions change, erroneous interpretations are made, specifications are defective, and changes in performance are required.

ASBCA No. 29599 Mark Dunning Industries - 42

Issue: Changes - Original Specifications

Relevant Case Information: In a Mess Attendant Services contract, the contractor claimed the government changed requirements by adding an additional salad bar, causing more time to be expended in replenishing and cleaning. The contractor attended the prebid conference and a site visit, during which two salad bars were in operation. He contended that the CO stated that only one salad bar would be required. When the government testified that a question was asked about salad bar requirements, and the statement that the requirements would not change, the contractor stated that at the site visit the dining hall supervisor had told him only one salad bar would be used. The dining hall supervisor testified that it wasn't until 1 October, the start of the contract, that the decision to try only one salad bar was made. After complaints about the lack of the second salad bar, about three weeks into contract performance, it was put back into operation. The amount of salad prepared was never

any different, whether one or two salad bars were used, and the unused salad bar had to be cleaned whether or not it was used.

Board Decision: The Board found that the contract required two salad bars, the site visit attended by the contractor presented two salad bars in operation, and the prebid conference statement that requirements would not change concerning salad bars was enough proof that no change was made. The government temporarily waived its' right to two salad bars which it also had the right to reinstate. The contractor's appeal was denied.

ASBCA No. 27369 Oxwell, Inc. - 59

Issue: Changes - Original Specifications

Relevant Case Information: Oxwell, Inc. was awarded a contract to overhaul hydraulic turbopumps. During contract performance, a shortfall in Government-Furnished Material (GFM) made it necessary to set aside unreparable assemblies and obtain the next higher assembly in the overall repair process. The government did not delete the requirement for repair of these parts, but negotiated an equitable adjustment for the increased cost because of the shortfall in GFM. When GFM became available, Oxwell decided it would not repair the assemblies that had been set aside without additional compensation, since the government "instructed appellant not to delay regular overhaul of turbopumps in order to divert production to old governors" (4:86403).



Board Decision: The Board denied the claim because the repair was never deleted from the contract and Oxwell did not provide sufficient proof of the use of "premium time" in the actual repair of the 293 governors that were set aside.

Bare allegations do not constitute proof, and there must be some evidence of damage to support a finding of liability. Cosmo construction Company v. United States [16 CCF para. 80,048], 196 Ct.Cl. 463, 451 F.2d 602 (1971) [4:86404].

ASBCA No. 27436 Moore Service, Inc. - 73

Issue: Modifications - Constructive Changes - Past Conduct -  
Summary Judgement

Relevant Case Information: In a refuse collection and disposal services contract, Moore Service, Inc. appealed to the ASBCA, claiming that a constructive change had taken place, based on past conduct by the government. The appellant had performed several refuse collection contracts for the government at different bases, all with the same contract language. After award of the instant contract, appellant was directed to collect loose refuse outside of the specified containers in areas of the base other than the housing area. This was clearly according to language in Clause H-13 of the contract, but the prior conduct of the government did not require this level of performance. The government, therefore, asked for summary judgement on the case.

Board Ruling: The Board found that there were several precedent cases substantiating a claim such as this:

Gresham & Co. v. United States [18 CCF para. 81,896],  
200 Ct.Cl. 97, 470 F.2d 542 (1972); L. W. Foster  
Sportswear Co. v. United States [13 CCF para. 82,493],  
186 Ct.Cl. 499, 405 F.2d 1285 (1969).  
Doyle Shirt Manufacturing Corp. v. United States [17 CCF  
para. 81,544], 199 Ct.Cl. 150, 462 F.2d 1150 (1972) [4:  
81546 - 81547].

The government, in its argument, had ignored the case law on the matter at hand, and had not prepared its case for such an argument. Therefore, the Board denied the government's motion for summary judgement and directed the parties to prepare for trial on the merits of the case.

ASBCA No. 24843, 25375, 25632 Logistical Support, Inc. - 70  
Issue: Modifications - Constructive Changes - Extra Food  
Service

Relevant Case Information: Logistical Support, Inc. was awarded a contract to provide mess attendant services at McChord AFB, Washington. A number of disputes arose during the life of the contract and ended with ten claims appealed to the ASBCA as follows:

1.) Fire Department Claim. The contractor appealed, requesting additional compensation for serving food away from the dining hall. Logistical Support, Inc. was required to prepare, assist in transporting, and serve food at the fire station three times daily, and contended this was beyond contract requirements.

Board Decision: The Board determined that Section F, paragraph 6.11.6 clearly stated the requirement for serving food at the Fire Department. This claim was denied.

2.) Cashiering Services. The contractor appealed for additional compensation for extra work caused by the change from the rationing system to the a la carte system. This was an amendment to the solicitation before bidding.

Board Decision: The Board denied the contractor's claim because amendment 2 to the solicitation clearly notified the contractor that programmed cash registers would be utilized. The contractor testified that he was aware of the impending change from the ration system to the a la carte system. Because of this the Board determined that a patent ambiguity existed, and the contractor had a duty to ask what the change would mean in terms of the cashiering duties before bidding.

3.) Transfer of Equipment to Castle. Upon closing of Ranier Dining Hall for renovation, some equipment and dishes were transferred to Castle Dining Hall to handle the increase in meals served there because of the Ranier Dining Hall closing. Appellant claimed additional costs for increased cleaning requirements.

Board Decision: The Board determined that the transfer of equipment did not increase the contractor's costs, but made the operation more efficient than it would have been without it. Appellant failed to prove otherwise. The claim was denied.

4.) Additional Cleaning Requirements - Ranier Dining Hall. Upon reopening of the renovated dining hall, requirements had changed considerably. Extra wall space was added, room

dividers were deleted, tile was replace by low maintenance vinyl, and new rugs replaced old vinyl tile. The contractor appealed for costs of additional cleaning requirements.

Board Decision: The Board recognized that changes had taken place, both increasing and decreasing contractor's work requirements. Because of this, the Board remanded this issue to the parties to determine the impact, whether more or less work was required, and negotiate a settlement.

5.) Security Police Feeding. Four months after award of the contract, the contractor claimed that the feeding of security police was beyond the contract requirements and requested an equitable adjustment. Appellant was required to prepare and package individual meals for security police pickup three times daily as was required in the previous contract.

Logistical Support, Inc. did not attend a site visit or the prebid conference in preparation of its bid, which would have apprised him of the requirements.

Board Decision: The Board found that the requirement for serving "meals to the Fire Department or other situations requiring this service" (4:82374) included the feeding of security police. The meal count estimate included meals served to the security police. The claim was denied.

6.) Tables and Chairs. During the closing of Ranier Dining Hall, additional tables and chairs were required to accomodate the extra personnel served at Castle Dining Hall. The contractor obtained an expert witness to determine the

additional time and cost associated with the additional cleaning and bussing.

Board Decision: The Board considered the method of calculating time spent for bussing tables by contractors expert reasonable, and granted an equitable adjustment in the amount of \$12,321.96 for this claim.

7.) Salad Bar. During the period the Ranier Dining Hall was closed for renovation, its salad bar was moved to Castle Dining Hall. The contractors expert calculated the extra time and effort caused by this change, the amount was set at \$5,014.38. The government made calculations of its own regarding this change, and considered \$2,051.28 a reasonable amount.

Board Decision: The Board recalculated the amount due the contractor using the COs method of calculation, but awarded the number of days requested by the contractor. The equitable adjustment totaled \$4,448.88.

8.) Water Leaks - New Equipment. During the contract period, new equipment was improperly installed by the government, causing water to run onto the floor, requiring extra cleanup time to be expended. The contractor claimed that one person mopped floors six hours each day, for the 21 days, at a cost of \$1,118.80.

Board Decision: The Board, not hearing testimony in opposition to the appellant's that the costs occurred, awarded the appellant \$1,118.80 as requested.

9.) Relocation of Planters. Appellant claimed his personnel spent fifteen hours relocating planters from Ranier Dining Hall to Castle Dining Hall when Ranier closed for renovation. The government contended that none of the appellant's personnel were ordered to do so.

Board Decision: The government conceded that appellant's employees assisted in moving the planters from Ranier to Castle Dining Hall, but did not help in the arrangement once they were delivered. The Board found that the contractor was due compensation for 15 hours work X \$8.88/hr = \$133.20 and awarded that amount.

10.) Ice Machine Leaks. The contractor claimed that an ice machine leak made it necessary for one person to mop for six hours each day for four days until the leak was repaired. The government contended that it required contractor personnel to empty a pan twice daily for the duration of the leak.

Board Decision: The Board hearing the conflicting testimony, chose to believe the respondent's dining hall supervisor, and denied the claim.

ASBCA No. 30552 McLean & Shultz - 45

Issue: Scope of Contract - Minor Changes

Performance - Predesign Advice

- Defective Specifications

- Change in Form of Specifications

Relevant Case Information: The A&E services contract awarded

to McLean & Shultz required work for several different projects. Claims were filed concerning some of these to include the following:

1.) Building 3940: Plans, specifications, and cost estimates were required for addition to and alteration of this building. In this project the contractor claimed that changes made were beyond the scope of the contract. Some changes at the 30% completion point, to reduce project costs, included changes to the floor plan, moving items, and some offices were made smaller. A counter was added that had not been contemplated at the start of the project. At the 60% completion stage, carpet requirements were changed and addition and deletion of walls was required and deletion of an alarm system was also requested.

Board Decision: All of these changes, with the exception of the addition of the counter, were considered minor and non-compensable because such minor changes should be expected at early design stages. The general provisions stated that minor changes within the scope of the contract should be expected during the progress of design and allowances made for them. The contractor was entitled to costs for the work required to detail the counter.

2.) Working Dog Facility. There were two points of claim, one which the government conceded and one the contractor conceded at the hearings. The remaining claim in this area was for extra costs involved in enlarging the training area

which the contractor contended was changed after award of the contract and required additional site investigation and surveying. The government provided convincing testimony that the size of the dog training area had been discussed at the site visit and the contractor was unable to prove otherwise. Board Decision: The claim for entitlement was denied.

3.) Install Meters. A claim for entitlement for a meter that was not part of the contract was settled between the parties without a decision by the board.

4.) Insulation of Jet Engine Test cell Office. The contractor was supposed to prepare plans, specifications, and cost estimate for noise reduction for an office adjacent to a engine test cell. The government requested a construction cost not to exceed \$20,000. The contractor claimed the government was supposed to furnish an analysis of the current noise levels, but the contract clearly stated that the contractor would make site visits, inspection, survey and analysis necessary, and to provide the solution for the noise reduction.

Board Decision: The Board denied the claim because the contractor failed to prove his claim and testimony by the government and the contract provisions stated that the contractor would provide the analysis.

5.) Division 1. This last claim was for costs for a change during performance from use of the Corps of Engineers guide



specifications to a "CS1 (Construction Industry Institute) version" (4:91695). Although the case uses this terminology, the researcher believes it should read "CSI (Construction Specification Institute)." The contractor claimed extra costs, when in fact the change was a benefit because he had used the specification guide before. The guide was loaded in his computer and only required copying rather than editing that would have been required for the Corps of Engineers guide.

Board Decision: The Board denied the claim.

ASBCA No. 34044 JBS Missouri, Inc. - 6

Issue: Changes - Property - GFE - Maintenance of Additional  
Equipment - Price Adjustment for Changes in Wage  
Determinations - Renewal Contracts

Relevant Case Information: During the mess attendant services contract, the government deleted some Government-Furnished Equipment and added more GFE, not necessarily the same type of equipment. The contractor contended more time was spent on the cleaning and day-to-day maintenance of this equipment and filed a claim for additional compensation.

Also, a new Wage Determination required an increase in the amount paid the mess attendants. The contractor had been paying some mess attendants a \$.50 or \$1.00 hourly bonus for supervising when the normal supervisor was absent. He also filed a claim for the additional amount to pay them beyond what the Wage Determination required. The CO denied both

claims and the contractor appealed.

Board Decision: The Board found that the removal of some equipment and the addition of different new equipment was proven by specific "timed observations" to add cost to the contractors schedule. Therefore, this part of his appeal was sustained. The Board found for the government on the other claim, stating that the government was not required to pay beyond what the Wage Determination increase required. If the contractor voluntarily paid more than the Wage Determination required, that was his business judgement to do so, and not compensable by the government.

Changes - Lessons Learned. Many claims can easily be filed in this area. Government personnel must know the requirements of the contract and be certain not to require more than is stated in the contract.

When conditions change, an assessment must be made of the situation, and a determination made as to whether a modification should be written to encompass the change. Care must be taken to ensure that the bounds of the scope of the contract are not breached. Communication between the parties should be encouraged to provide a common understanding, and negotiation if necessary to determine if more or less cost is required by the change.

A difficult situation is presented in Moore Service, Inc., where prior performance and conduct of the parties sets a precedence for present interpretation of a new contract. If contract management personnel are aware of past require-

ments that have not been enforced, and then intend to enforce the same requirements on a contractor, this may be considered a constructive change. The government, by its way of doing business, must be consistent in what it expects and requires of the contractor. If the government waives a requirement for a period of time, enforcement of that requirement becomes a constructive change from past conduct and carries weight in an appeal to the Board.

Some contracts, because of the type service provided, are inherently vulnerable to claims of changes. One of these is the A&E requirements. This is where the CO must rely on technical personnel for interpretation of the kinds of changes that are within the scope of the contract. The technical personnel must advise the CO when changes are not within the scope and require a modification to the contract or a new contract entirely.

#### Reprocurement

When a contract is Terminated for Default the government has the right, under the Default Clause, to reprocure the service and assess any excess costs to the defaulted contractor. In essence, the contractor, in accepting the contract for the bid price, guarantees the government it will complete the contract for that amount. If he/she defaults the contract, he/she must pay for the excess reprocurement costs. The following example simply illustrates how this principle affects the contractor.

Example:

Defaulted contractors contract price	\$100,000
New contract + administrative costs for reprocurement of services	\$150,000
Excess reprocurement costs	\$ 50,000

If the original contract is defaulted, the contractor is also liable for excess costs for the option years that may have been included in the contract, as well.

The CO has the responsibility to mitigate costs as much as possible, but is offered some latitude in the reprocurement process, such as, negotiating a new contract rather than reprocuring by advertising. The CO must not purchase a greater quantity or quality of service than he would have received from the defaulted contractor. If a greater quantity is required, adjustments must be made to the assessment against the contractor, or a new acquisition must be made for the entire quantity (5:49.402-6).

ASBCA No. 26180 and 26182 Lewis Management and Service  
Company - 46

Issue: Duty to Mitigate and Mutual Fault - Mistakes -  
Verification

Relevant Case Information: Of the three shelf stocking/custodial services contracts awarded to Lewis Management and Service Company for the 1979 - 1980 period, only the CO's at Davis-Monthan and Langley AFB's assessed excess reprocurement costs against the contractor after termination for default. The contractor claimed that mistakes were the cause, and it

was as much the fault of the government as it was the contractors'. Lewis asserted that the range of bids and the huge difference between his bids on the projects and the government estimates should have been clear evidence to the government that he could not perform for the price bid.

Davis-Monthan

Range of Bids	\$199,204.56 to \$848,361.60
Government estimate	\$1,118,335.39
Lewis' bid	\$463,502.64

Langley

Range of Bids	\$89,752.56 to \$378,000.00
Government estimate	\$185,978.88
Lewis' bid	\$128,234.40

In each case the low bidder alleged a mistake in bid and was allowed to withdraw its' bid. At Davis-Monthan, the second low bidder was considered nonresponsive for failure to acknowledge an amendment. Lewis was the next low responsive bidder and received the award.

In the Davis-Monthan bid, the CO had possession of the contractors bid papers, which showed a wide disparity from that of the government estimate in the areas of labor hours and stocking rates. The CO did not request bid verification, because he did not suspect a mistake in bid, but awarded the contract to Lewis. Of the 17 bidders, three were in the \$400,000 plus range.

In the case of the Langley bid, however, the CO did not have the contractors bid papers to determine his estimates, but considered the bid low compared to the other bidders. The CO requested bid verification, at which point Lewis sent his estimator to Langley. The CO suggested that the bid may

have been low in the area of the wage rates he was going to pay and the productivity level expected was too high. After visiting the commissary and some discussion with the CO, the estimator spoke with Lewis by telephone. He then presented the CO with previously typed letters verifying the bid.

Board Decision: In the Davis-Monthan case, the Board found that with the wide disparity in bids, there should have been some suspicion on the part of the CO that Lewis' bid was mistaken, and verification should have been requested. The Board cited "Chernick v. United States, 372 F.2d 492,496 (1976); Figgie International Inc., ASBCA No. 27541, 83-1 BCA para. 16,421" (4:92463). The appeal from excess reprocurement costs was sustained.

In the Langley case, the Board found that the CO, not having the bid papers, had put the contractor on notice as best she could, that the bid was considered low. Without the bid papers, the CO could only suggest that the problem areas might be wage rates and productivity. Therefore, the "mutual fault" rule enunciated in United States v. Hamilton Enterprises, supra, does not apply" (4:92465). The Board denied the contractors appeal from excess reprocurement costs. The government was entitled to \$158,841.76, but was premature in its request for costs for the period from 1 October 1981 through 30 September 1982.

ASBCA No. 1) 28511 Givens Services, Inc. - 65

2) 31048 Givens Services, Inc. - 17

Issue: 1) Reprocurement - Computations - Recomputation by  
Board

2) Reprocurement - Assessment of Excess Costs -  
Option Periods

Relevant Case Information: The contractor was terminated for default due to its' failure to provide and maintain adequate insurance for the term of its' custodial services contract. The government assessed reprocurement costs against the contractor which the contractor considered excessive, and therefore appealed the COs final decision to the ASBCA. The government claimed \$41,334.81 in reprocurement costs, and reserved the right to assess excess reprocurement costs for the remaining option period.

Board Decision: The Board heard the first case in January 1984. At that time it recomputed the costs minus the amount the contractor would have received had the contract gone to completion and determined the contractor should only be assessed \$12,759.20 in excess reprocurement costs.

The government upon reprocurement of the remaining option year, assessed excess reprocurement costs in the amount of \$33,193.63 plus interest against the contractor, and again the contractor appealed the contracting officer's decision. The contractor believed that the \$12,759.20 was the final amount that would be assessed against him.

Board Decision: The Board heard the second case on 6 October 1986, and ruled that the excess reprocurement costs of

\$33,193.63 plus interest were proper and due by Givens Services, Inc.

Reprocurement - Lessons Learned. The shelf-stocking/custodial services contracts at Davis-Monthan, Langley, and Wright-Patterson AFBs, indicate how three bases handled reprocurement costs and the outcome of each method.

The CO at Wright-Patterson did not assess excess reprocurement costs against the contractor.

The Davis-Monthan and Langley COs assessed excess costs, but only the Langley CO had followed the bid verification procedure, and therefore notified the contractor that his bid price was suspected low in general areas. Lewis insisted that he would be able to perform at the Langley commissary, and verified his bid. At Davis-Monthan the CO failed to follow the verification procedure, and did not present the contractor the opportunity to allege a mistake in bid.

The Langley CO acted properly and won that part of the appeal. Even so, the administrative time spent in preparation of the case was costly. If the contractor had been given the proper treatment at all three bases (e.g., notification that his bid was considered low and required to verify the bid) all within the same time frame, he may have realized that there was a problem with his assessment of the requirements. He could have then taken a closer look at the situation and maybe alleged a mistake in bid and freed himself of a potentially bad business decision. This is obviously an optimistic view of the situation.



In the custodial services contract, the government miscalculated the excess reprocurement costs. Having withheld payment from Givens Services, Inc., reprocuring the services after default, and then withholding payment from the reprocured contractor at some point, further complicated the matter. The Board recalculated, as the government should have done, to ascertain the proper amount.

Upon reprocurement of the option year, the government assessed excess reprocurement costs for that period as well. The contractor should have known that the government could not assess costs in advance of the reprocurement for the option year yet to be awarded. The CO acted properly.

Care should be taken when the lengthy procedure of default and reprocurement is undertaken, to track payments withheld, payments made, and administrative costs expended.

#### Indefinite Quantity Contracts

An indefinite quantity contract is just that, a contract for a supply or service that cannot be quantified at the onset. Estimates are made, and maximums are usually set, at which point either party has the right of refusal. One contract for removal of contaminated waste falls within this category.

ASBCA No. 29804 American Processing Co., Inc. - 16

Issue: Indefinite Quantity Contracts - Requirements

Contracts - Delivery Order Limitations

Relevant Case Information: In a contract for transport and disposal of contaminated waste, American Processing Co., Inc. filed a claim stating the government breached the contract causing loss of profit. Appellant asked for settlement costs because of the termination of the contract. The contract contained "Requirements" and "Delivery Order Limitation" clauses which specified what was required, the maximums per delivery order and the maximum amount for the entire contract. Until excavation was begun an estimate of quantities was impossible to accurately quantify. When the liquid waste exceeded the contract estimates modifications were written and funded to have it removed. The contractor had the right at this point, to refuse the order and the government had the right to issue a separate contract as well. The government and contractor agreed on the modification. When the determination was made that the contaminated soil would exceed the maximum estimated in the contract, the government reviewed its options and made a determination to

"Return the contaminated soil to the excavation, add new soil to replace the volume of the tanks and install a four inch concrete cap over the excavation and the adjacent areas that contained contaminated soil" [4: 98627 - 98628].

The contractor filed a claim that the government had in effect breached the contract and requested compensation for loss of profit.

Board Decision: The Board found the contract stated estimated amounts that, if exceeded, the government was not required to order and the contractor was not required to

accept. For this reason the government was not considered in breach of the contract. The appeal was denied.

Indefinite Quantity Contracts - Lessons Learned. One of the conditions of a requirements type contract clearly states:

(d) The Government is not required to purchase from the Contractor requirements in excess of any limit on total orders under this contract [5:52.216-21(d)].

The contractor was not willing to allow the government its right of refusal, but wanted to complete the removal of the contaminated soil, which would have been very profitable. The government could have used the preperformance conference to clarify the possible outcomes, depending on the findings at the site. This would have better prepared the contractor for the actual outcome when the government decided on a more feasible solution to the problem.

Board Procedure - Contracting Officers Decision/Timeliness

In order for the ASBCA to have jurisdiction over a case certain rules must be followed prior to an appeal to the Board. A claim must be filed with the CO and the proper time allowed for the COs final decision. The claim must state clearly that "this is a claim" and if \$50,000 or more, the Contractor must certify that the claim is made in good faith, and that all the data is accurate and complete (6:17) (7:16-4) to the best of its knowledge. If the CO fails or refuses to issue a final decision in a timely manner the contractor can appeal to the ASBCA or the Claims Court. If

the contractor appeals to the Board without first filing a claim with the CO, the Board must dismiss the case and instruct the contractor to follow the proper procedure.

The appeal must also be timely; it must be filed within 90 days of the COs final decision (6:17).

ASBCA No. 34257 Canadian Commercial Corporation (CCC) - 3

Issue: Demand for Final Decision

Relevant Case Information: The contractor appealed to the ASBCA because the CO failed to issue a final decision. The contract for transient alert services had been extended from 7 1/2 months to full year services by a supplemental modification, which was executed by the CO and CCC. The contractor then began writing letters to the CO requesting an adjustment in price for the services. The CO explained that the modification was the only adjustment that was going to take place, and stated that if CCC was not satisfied with the contract as modified, his complaint should be dealt with under the Disputes Clause of the contract (meaning that he must file a claim). CCC again wrote a letter with the same response from the CO. At this point the contractor filed an appeal to the ASBCA.

Board Decision: The Board dismissed the appeal without prejudice, for lack of jurisdiction, because the contractor had failed to file a proper claim with the CO. The process requires that "This is a claim" is clearly stated when a final decision by the CO is requested.

ASBCA No. 28743 Ralph's Transfer & Storage Company - 48

Issue: Contracting Officer's Decision - Government Claims -  
Submission

Relevant Case Information: The contract for moving and storage of household goods was disputed because the CO assessed liability against the contractor for damages to several shipments of household goods. An appeal by the contractor to the ASBCA for denial of those assessments resulted. There were ten shipments against which liabilities for damages were assessed.

Board Decision: The Board found that in two of the shipments the claims had not been decided by the CO, therefore, the Board had no jurisdiction to hear the appeal and dismissed the two cases. On two different cases of claims for damages assessed against the contractor, notice had not been given within a year from delivery of the shipments, therefore, notice was untimely and the appeal was sustained. For the remaining claims, timely notification was given and the appeal was denied. The Liability clause states in part:

In the absence of evidence or supporting documentation which places liability on a carrier or another contractor, the destination contractor will be presumed to be liable for the loss or damage of which it is timely notified [4:90948].

The contractor failed to provide proof that damage occurred at the fault of another contractor.

ASBCA No. 29824-101 Logistical Support, Inc. - 55

Issue: Contracting Officer's Decision - Failure to Decide -

### Order to Decide

Relevant Case Information: The contractor appealed to the Board because he had waited an excessive amount of time without receiving a final decision on two claims he had filed. While the appeal was pending a hearing, the CO issued a decision on one of the claims, but had not rendered a decision on the remaining claim.

Board Decision: The Board ordered the CO to issue a decision within 30 days or the claim would be considered denied, at which time the contractor could appeal according to the Contract Disputes Act of 1978.

ASBCA No. 34268 Western States Management - 7

Issue: Timeliness

Relevant Case Information: In the case of Western States Management Services, Inc., the contractor filed a claim through its attorney with the contracting officer. The contracting officer refused to issue a final decision because the claim came from the attorney without any notice from the contractor that the attorney was authorized to act on his behalf. The contractor understood this as a refusal to render a decision and immediately filed an appeal with the ASBCA. The government filed a motion to dismiss on the basis that the contractor filed the appeal prior to the 60 days allowed for the contracting officer's decision. Between the time of the appeal and the actual ruling on the case, time had elapsed to presently make the appeal timely, since the

contracting officer had still not issued a final decision. The Board determined that the appeal would have been untimely at the time it was filed, had the case been ruled on instantly. Also, between the time of appeal and the ruling, correspondence and pleadings between the parties had taken place, making a ruling by the board unnecessary.

Board Procedure - Contracting Officers Decision/Timeliness - Lessons Learned. Some basic principles of the Contract Disputes Act of 1978 must be remembered concerning claims and their appeal to the ASBCA.

- (1) A claim must first be submitted to the CO in writing, clearly stating that it is a claim and must request a final decision by the CO.
- (2) The CO must render a final decision before the ASBCA will have jurisdiction to hear the appeal of a claim. If the CO has not rendered a final decision in a timely manner the Board can order a final decision within a specified time period. If the CO refuses or fails to render a decision, the Board can then hear the appeal, considering the claim denied by the CO.

When it is evident the contractor wishes to file a claim, clear instruction on the procedures is necessary. When a claim is received, it should be handled expediently to be fair to the contractor and to avoid an order from the Board to do so.

## V. Conclusions and Recommendations

### Overview

This chapter summarizes the conclusions from the findings in chapter four. The research objectives are the basis for the conclusions, and some recommendations are made for the avoidance of contract disputes.

Recommendations for changes in the process and for further study are also discussed.

### Conclusions

Research Objective 1. The type of service contracts most likely to have disputes appealed to the ASBCA.

The case-by-case analysis indicated that Housekeeping and Base service contracts were greater in number than any other service at 36.5% of the total number of service contracts appealed during the five year period. Transportation and related services and Maintenance, overhaul, repair, servicing, and modification of supplies, systems or equipment followed with 17.6% each of the cases appealed; 10.8% occurred in the area of Routine recurring maintenance of real property. The remaining cases were 8.1% for Operation of Government owned equipment, facilities, or systems, 6.7% for consulting services, and 2.7% for Architect and Engineering services. There were no appeals to the ASBCA level for Engineering and Technical, Communications, or Research and Development services during this period.



Any statistical analysis other than the percentage of cases in a particular service type to the total number of cases appealed to the ASBCA level is beyond the scope and intent of this study. The data does seem to indicate to the researcher, however, that the more professional or technical the service required, the less likely an appeal will result. This possibility is discussed in greater detail in the recommendations.

Research Objective 2. The predominant claim categories and issues appealed to the ASBCA.

The number of claims or issues raised in the disputes outnumbered the actual number of cases appealed. Many of the cases contained multiple claims. The predominant claim categories were as follows in descending order: Boards Procedure, Costs (14 in one case), Interpretation of Contracts, Changes, Performance, Reprocurement, Defaults, Pricing of Adjustments, Indefinite Quantity Contracts, Payments, and Property. There were others that are listed in chapter four, but were few in number. Many of the categories listed are broad categories with many significant subcategories that were discussed in detail in chapter four, such as, Interpretation of Contracts - Contract as a Whole, Duty to Seek Clarification, Clear Meaning, and etc.

Research Objective 3. Lessons that can be learned from the cases that have been decided by the ASBCA.

The cases show that no matter how well the government does its' job in preparing the contract documents, there is no guarantee that an appeal of the COs final decision will not occur. This is proven by the many cases the government clearly had the proper position, and the Board denied the contractors' appeal. Therefore, government personnel must strive toward professional standards in every contract in an attempt to clarify specifications, eliminate ambiguities, require only what is provided for in the contract, and prepare an equitable modification when the contract is inadequate.

The claim categories which provide the best opportunity for improvement are in the areas of Interpretation of Contracts, Changes, and Performance. Of the 122 claims listed in Table 2, forty-five were in these areas. If improvement could be made to eliminate even a fraction of these claims, other related claims would be favorably impacted as well.

#### Recommendations

Education of Contracting personnel, Contract Management personnel, and Contractors. There are several areas of expertise and communication techniques that could be improved to recognize the possibility of claims appearing during the administration of contracts. Those areas include, but are not limited to: writing clear and concise specifications, requirements, and contractual execution language; communicating with contractors before and after award; communication

between government personnel both intrabase and interbase; and execution of the contract as written.

In preparing the contract documents it is important that technically qualified personnel write clear and concise specifications and requirements. The cases appealed to the ASBCA seem to indicate that the more technical and professional the service required, the less likely an appeal will occur. This indication could be attributed to the skills and knowledge of the writer of the PWS/SOW, in that an unskilled individual would not be tasked to write a SOW for an Architect and Engineering or Research and Development request. Few contracts of this type were appealed during this period. To ensure that even the least technical request is written properly, a Performability Review should be conducted by technically qualified personnel, other than the writer, to increase the discovery rate of areas of weakness or errors that could hamper its performability. The same person should not always review the work of an individual, to prevent becoming too familiar with the style and knowledge of the writer and to keep each document written in the proper perspective. It is equally important that the contract language that executes the requirements is clear and concise, not only to legal and contracting personnel, but also to the layman. Part of the Contract Review Board (CRB) should include someone other than contracting and legal personnel for the same reason stated in the Performability Review.

As much as the contracting procedure permits, whether sealed bidding or negotiation method of contracting is used, communication between contracting personnel and the contractors is important to ensure the requirements are understood before and after award. Prebid conferences and site visits should be conducted by knowledgeable personnel and involve all government personnel that will be involved in the execution and management of the contract during the administration phase. In this instance, it would be helpful if contracting personnel were able to prepare the solicitation, make the award, and administer the contract to its completion (cradle to grave concept).

During the evaluation of bids, award, and execution of the contract, communication is important as well. At this point in time, to the researchers knowledge, there is no central data base for contracting personnel to receive responsibility data about services contractors. There are cases where contracts would be denied to unqualified contractors and awarded to qualified ones, had a central data base collected unfavorable and favorable information about contractors. In other words, share the "headaches" and the "success stories" with others in the field. During the evaluation of bids, a thorough Preaward Survey (PAS) would aid in the process of discovery of mistakes, or inability of the contractor to perform a contract to its completion. Within the PAS, an estimation of materials required, manning

levels and classes, manhours required, and a Quality Control Plan would further indicate whether the contractor has thorough understanding and knowledge to complete the contract.

During execution of the contract, government personnel working closely with the contractor, including the QAE, technical representative, and others must be the eyes and ears for the CO. Many times these personnel may realize problems exist and prevent a claim by informing the CO. This would provide an opportunity for discussion and the possibility of improving the situation before a claim is filed. Sometimes small problems mushroom to the point that the contractor feels he must file a claim, when early discussion could eliminate the problem entirely.

During the performance of the contract it is equally important that each person involved in the execution of the contract requirement, such as the CO, Technical representative, QAE, and inspector has complete knowledge of the requirements. Those personnel that will be closely involved with the contractor should be present at prebid conferences and preperformance conferences to ensure that all have the same understanding of the requirements to prevent requiring performance beyond the scope of the contract.

Cross-talk of COs and contract management personnel between bases would be helpful when concerned with performance or nonperformance of contractors. One way to accomplish this would be to require contracting personnel to

attend contract management courses periodically, where they would interface with engineers and contract management personnel. This would also promote better understanding and maybe a better working relationship between contracting and contract management personnel.

Negotiation - a viable alternative. When contracting for services, the CO should consider the possibility that discussions may be needed for complete understanding of the requirements. The contractors proposals would provide a good indication of whether or not the requirements are clear, and the contractor has the required skill, knowledge, and ability to perform the service. The contractor would have an opportunity to revise his price after discussions, and provide the service with full understanding of the requirements. The technical personnel should indicate to the CO when discussions would be advantageous because of inherent ambiguities of certain requirements. Past experience is also a good indicator of when negotiations are needed. Common sense must be applied to each situation and justifications written for the decisions made.

#### Recommendations for Further Study

Determination of Sealed Bid vs. Negotiated procurements. From the ASBCA cases, it was not always possible to determine which procedure was used to make the procurement. It would be interesting to determine how the contracts were procured

and compare the win/loss ratio to the type of procurement procedure used. This would clarify whether negotiation would indeed be a better method to use for service contracts.

Follow up Study. A follow up study for a five year time period in the future would provide an indication of improvement or deterioration of the condition of our requirements and contracts. The contracting out of commercial activities is a fairly new practice, and hopefully, time will provide improvement in our skill and knowledge in providing for them.

# Appendix A: Population Case List

(BCA Volume #)		
ASBCA #	Para. #	Appellant Name
	(88-1)	
1. 35578	20,469	Logistical Support, Inc.
2. 30574	20,349	Aldi Corporation
3. 34257	20,224	Canadian Commercial Corporation
	(87-3)	
4. 34493	20,035	Logistical Support, Inc.
5. 34067	20,013	Food Services, Inc.
	(87-2)	
6. 34044	19,904	JBS Missouri, Inc.
7. 34268	19,852	Western States Management Services, Inc.
8. 32587	19,749	Lear Siegler Inc., Management Services Division
	32588	
9. 32504	19,713	Sol-Mart Janitorial Services
10. 28668	19,690	Airtech Precision Shot Peening, Inc.
11. 31305	19,680	USD Technologies, Inc.
	(87-1)	
12. 29311	19,622	Fiesta Leasing and Sales, Inc.
13. 27064	19,601	Harold Bailey Painting Company
14. 31078	19,599	Nelson Energy Enterprises
15. 33424	19,564	Federal Contracting Corporation
16. 29804	19,513	American Processing Co., Inc.
17. 31048	19,418	Givens Services, Inc.
18. 29096	19,388	Systems Concepts, Inc.
19. 31701	19,369	James M. Smith, Inc.
20. 32483	19,363	The Saxon Corporation
	(86-3)	
21. 32126	19,115	Government Contractors, Inc.
22. 31093	19,152	D.S. Agency
23. 30224	19,155	Lear Siegler, Inc., Management Services Division
24. 29486	19,238	Dan's Janitorial Service, Inc.
25. 27855	19,247	United Contract Services, Inc.
26. 31100	19,300	Fox & Ginn Moving & Storage Co.
27. 30635	19,154	Wright's Auto Repair, Inc.
28. 28721	19,094	Raytheon Service Company
29. 29311	19,045	Fiesta Leasing and Sales, Inc.
	(86-2)	
30. 27523	18,967	Oxwell, Inc.
	27524	
31. 31925	18,958	Structural Finishing, Inc.
32. 27492	18,921	Habitech, Inc.
	27493	
	27495	
	27496	
	27497	
	27498	
33. 29847	18,915	Peat, Marwick, Mitchell & Co.



(BCA Volume #)		
ASBCA #	Para. #	Appellant Name
34. 29230 29642	18,790	Teague Industries & Technical Services Company
	(86-2)	
35. 31121	18,780	Sylvan Service Corporation
36. 30569	18,756	Raymond E. Kitchen dba Ray Service
	(86-1)	
37. 29995	18,738	American Photographic Industries, Inc.
38. 30247	18,736	Gemini Services, Inc.
39. 28085	18,696	RNB Enterprises & Motorworks
40. 29602	18,580	Tayko Industries, Inc.
41. 30369	18,579	Nero and Associates, Inc.
42. 29599	18,521	Mark Dunning Industries
	(85-3)	
43. 30699	18,422	Thunder Corporation
44. 30643	18,409	Structural Finishing, Inc.
45. 30552	18,265	McLean & Schultz
46. 24802	18,416	Lewis Management and Service Company
24803		
24804		
26180		
26182		
	(85-2)	
47. 29602	18,116	Tayko Industries, Inc.
48. 28743	18,115	Ralph's Transfer & Storage Company
49. 30199	18,078	Oakland Janitorial Services, Inc.
50. 27183	18,076	Advance Building Maintenance Company
28219		
51. 24398	18,042	Lewis Management and Service Company
52. 24872	17,970	AAA Engineering & Drafting, Inc.
	(84-3)	
53. 25807	17,755	Vec-Tor, Inc.
26128		
54. 27436	17,577	Moore Services, Inc.
55. 29824-	17,550	Logistical Support, Inc.
101		
56. 29272	17,524	American Photographic Industries, Inc.
29832		
57. 29162	17,523	Valley Support Services
	(84-2)	
58. 28712	17,405	M&M Services, Inc.
59. 27369	17,340	Oxwell, Inc.
60. 27398	17,331	Fairbanks Moving & Storage, Inc.
61. 25050	17,293	Cage Company of Abilene, Inc.
	(84-1)	
62. 28154	17,226	DMJM/Norman Engineering Co.
63. 26964	17,172	Elro Swindle d/b/a Aircraftsman, Inc.
64. 25070	17,156	Dyneteria, Inc.
65. 28511	17,151	Givens Services, Inc.
66. 25807	17,145	Vec-Tor, Inc.

(BCA Volume #)		
ASBCA #	Para. #	Appellant Name
67. 28179	17,123	Skip Kirchdorfer, Inc.
28261		
68. 28602	16,991	Crown Laundry & Dry Cleaners, Inc.
	(83-2)	
69. 26338	16,736	P.J.K. Food Service Corp.
70. 24843	16,563	Logistical Support, Inc.
25375		
25632		
	(83-1)	
71. 26860	16,518	Huff's Janitorial Service
72. 24641	16,467	Webster Contractors, Inc.
73. 27436	16,401	Moore Service, Inc.
74. 27472	16,258	Oxwell, Inc.

## Appendix B: Claim Categories By Case and Service Type

### Service category

#### Actual Service Performed

Appendix Cross-ref Number	ASBCA case Number	Acronym of Appel. Name	Claim Category and Issue
---------------------------------	-------------------------	------------------------------	--------------------------

---

- a. MAINTENANCE, OVERHAUL, REPAIR, SERVICING, REHABILITATION, SALVAGE, MODERNIZATION, OR MODIFICATION OF SUPPLIES, SYSTEMS, OR EQUIPMENT.

#### Overhaul Diesel Generators

- |     |       |     |   |
|-----|-------|-----|---|
| 2.  | 30574 | AC  | 1) Cost Principles - Allowability - Interpretation of Contracts - Clear Meaning - Actual Cost<br>2) Procedure, Boards - Summary Judgement - Contract Interpretation |
| 40. | 29602 | TII | Pricing of Adjustments - Profits - Constructive Changes   |
| 47. | 29602 | TII | 1) Pricing of Adjustments - Profits - Constructive Changes<br>2) Contract Disputes - Interest - Starting Date of Interest   |

#### Shot Peening Services

- |     |       |       |   |
|-----|-------|-------|---|
| 10. | 28668 | APSPI | 1) Interpretation of Contracts - Preaward Communications - Prebid Conference<br>2) Modifications - Changes - Changes Without Compensation |
|-----|-------|-------|---|

#### Overhaul of Hydraulic Turbopumps

- |     |                |    |   |
|-----|----------------|----|---|
| 30. | 27523<br>27524 | OI | Property - Gov't-Furnished Material - Delays      |
| 59. | 27369          | OI | Modifications - Changes - Original Specifications |

#### Aircraft Instrument Repair

- |     |                |        |   |
|-----|----------------|--------|---|
| 34. | 29230<br>29642 | TI&TSC | 1) Indefinite Quantity Contracts - Estimates by Gov't - Exculpatory Clauses |
|-----|----------------|--------|---|

- 2) Indefinite Quantity Contracts - Requirements Contracts - Duration of Obligation
- 3) Delays - Adjustments - Gov't Deliveries
- 4) Cost Types - Termination Costs - Preparatory Costs
- 5) Convenience Terminations - Recovery - Segregation of Claim Preparation Costs

#### Overhaul of Oil Coolers

- 74. 27472 OI Modifications - Final Payment as Bar - Proof of Payment

#### Overhaul Vehicles

- 11. 31305 USDTI
  - 1) Procedure, Boards - Evidence - Hearsay
  - 2) Options - Validity of Exercise - Timeliness - Waiver of Objection
- 61. 25050 CCoAI
  - 1) Contract Disputes - Election of Contract Disputes Act Coverage - Timeliness
  - 2) Defaults, Excuses - Financial Problems - Credit

#### Repair and Maintenance of Refrigeration Equipment

- 36. 30569 REKdbaRSC
  - 1) Contract Disputes - Jurisdiction of Boards - Torts
  - 2) Contract Types - Blanket Purchase Agreements - Extent of Gov't's Obligation

#### Clock Maintenance

- 18. 29096 SCI Breach of Contract - Materiality

#### Lease and Maintenance of Work Processing Equipment

- 22. 31093 DSA
  - Interpretation of Contracts - Pre-award Communications - Proposal Details - Interpretation During Performance - Consistent Modifications

b. ROUTINE RECURRING MAINTENANCE OF REAL PROPERTY.

Family Housing Maintenance

- |     |                  |       |   |
|-----|------------------|-------|---|
| 13. | 27064            | HBPC  | 1) Modifications - Notice of Claims for Adjustments - Knowledge of Contracting Officer's Representative<br>2) Interpretation of Contracts - Contract as a Whole-Emergencies<br>3) Interpretation of Contracts-Painting Spraying<br>4) Interpretation of Contracts-Trade Usage-Painting<br>5) Interpretation of Contracts-Repair and Maintenance-Extent of Contractor Responsibility |
| 31. | 31925            | SFI   | Interpretation of Contracts - Clear Meaning - Contractor's Responsibility   |
| 32. | 27492 thru 27498 | HI    | Contract Disputes, Jurisdiction - Contract as Basis for Jurisdiction - Tax Liens  |
| 35. | 31121            | SSC   | Labor - Service Contract Act - Fringe Benefits  |
| 44. | 30643            | SFI   | Interpretation of Contracts - Heating and Cooling - Central Air Conditioning-Site Conditions - Failure to Inspect   |
| 58. | 28712            | M&MSI | 1) Contract Disputes - Jurisdiction of Boards - Fraud<br>2) Payments - Withholding - Invoice Acceptance   |
| 67. | 28179 28261      | SKI   | Procedure, Boards - Summary Judgement - Relevant Fact Issues  |

Heat Loss Reduction Service

- |     |       |     |  |
|-----|-------|-----|--|
| 14. | 31078 | NEE | Performance - Interference by Gov't - Failure to Assign Available Work |
|-----|-------|-----|--|

c. HOUSEKEEPING AND BASE SERVICES.

Mess Attendant

- |    |       |     |  |
|----|-------|-----|--|
| 1. | 35578 | LSI | Indefinite Quantity Contracts - Estimates by Gov't - Negligent Preparation |
|----|-------|-----|--|

4.	34493	LSI	Interpretation of Contracts as a Whole - Extensions
5.	34067	FSI	Pricing of Adjustments - Particular Costs - Costs of Performance
6.	34044	JBS MI	1) Modifications - Changes - Property - GFE - Maintenance of additional Equipment 2) Labor - Price Adjustment for Changes in Wage Determination - Renewal Contract
42.	29599	MDI	Modifications - Changes - Original Specifications
50.	27183	ABMC	1) Performance - Duty to Disclose Superior Knowledge - Cost of Prior Contracts 2) Mistakes - Relief After Award - Judgement Mistake - Defaults, Excuses - Labor and Personnel Problems - Key Personnel 3) Performance - Commercial Impracticability - Reprocurement Price 4) Reprocurement - Duty to Mitigate - Hiring Contractor's Employees - Original Bidders - Renewal Option 5) Reprocurement - Premature Assessment - Completion of Contract
51.	24398	LM&SC	1) Contract Disputes, Certification - Applicability of Requirement - Claim Pending on Effective Date of Contract Disputes Act 2) Interpretation of Contracts - Duty to seek Clarification - Patent Ambiguity 3) Interpretation of Contracts - Reasonableness - Food Service Contract 4) Pricing of Adjustments - Proof - Change Without Price Effect 5) Performance - Interference by Gov't - Supervision of Contractor's Employees
55.	29824 -101	LSI	Contract Disputes - Contracting Officer's Decision - Failure to Decide - Order to Decide

64.	25070	DI	Interpretation of Contracts - Interpretation During Performance - Conduct of Parties
69.	26338	PJK FSC	1) Interpretation of Contracts- Duty to Seek Clarification - Reasonableness of Contractor's Interpretation 2) Labor-Price Adjustments for changes in Wage Determinations- Rest Periods 3) Property - Government-Furnished Equipment - Nondelivery by Gov't - Notice of Nondelivery 4) Interpretation of Contracts-Contract as a Whole - Meaning to Every Part - Cleaning Duties
70.	24843 25375	LSI	Modifications, Constructive Changes, Extra Food Service 25632
72.	24641	WCI	1) Costs, Allowability - Disallowance - Retroactive 2) Labor - Price Adjustment for Changes in Wage Determinations - Taxes
Shelf Stocking/Shelf Stocking - Custodial			
7.	34268	WSMSI	Timeliness of Appeals to Board - Contracting Officer's Failure to Decide - Premature Appeals
9.	32504	SMJS	1) Mistakes - Verification - Failure to seek Verification - Relief After Award - Reformation 2) Invitations for Bids - Oral Repre- sentations - Proof - Mistakes - Relief After Award - Reliance on Gov't Advice
43.	30699	TC	Interpretation of Contracts - Contract Documents - Performance Requirements Summary
46.	24802 24803 24804 26180 26182	LM&SC	1) Mistakes - Relief After Award - Reformation - Misreading Specifica- tions 2) Defaults - Mutual Fault-Mistakes- Verification-Adequacy of Request 3) Reprocurement - Duty to Mitigate Negotiations 4) Defaults, Gov't Acts Excusing - Interference - Isolated Occurrence

57. 29162 VSS Performance - Interference by Gov't  
- Work Sites

71. 26860 HJS Indefinite Quantity Contracts -  
Estimates by Gov't - Negligent  
Preparation of Estimates - Shelf  
Stocking

Custodial Services

17. 31048 GSI Reprocurement - Assessment of Excess  
Costs - Option Periods

21. 32126 GCI Payments - Prompt Payment Discount -  
Location for Invoice Submission -  
Quality Assurance Evaluator v.  
Accounting and Finance Office

24. 29486 DJSI Options - Nonexercise - Right Not to  
Exercise Option

49. 30199 OJSI Payments - Overpayments - Gov't  
Error

65. 28511 GSI Reprocurement - Computations -  
Recomputation by Board

Grounds Maintenance

39. 28085 RNB E&M Defaults, Grounds - Failure to  
Progress - Grounds Maintenance

Refuse Collection

54. 27436 MSI Contract Disputes, Certification -  
Applicability of Requirement -  
Accruing Claim

73. 27436 MSI Modifications - Constructive Changes  
- Past Conduct - Summary Judgement

Contaminated Soil Disposal

16. 29804 APCI Indefinite Quantity Contracts -  
Requirements Contracts - Delivery  
Order Limitations



d. CONSULTING SERVICES

Consulting Services

53. 25807 VTI 1) Procedure, Boards - Reconsideration  
26128 - Correction of Findings  
2) Award - Authority to Contract -  
Effect of Lack of Authority  
3) Convenience Terminations -  
Propriety - Bad Faith  
4) Foreign Military Sales - Source  
Selection - Sole Source Procurement
66. 25807 VTI 1) Awards - Existence of Contract -  
Implied-in-Fact Contracts  
2) Convenience Terminations - Recovery  
- Anticipated Profit

Audit/Tax/Consulting Services

33. 29847 PMM&C Cost Types - Insurance - Profes-  
sional Liability Insurance -  
Procedure, Boards - Summary Judge-  
ment - Reservation in Agreement

Medical Transcription Services

15. 33424 FCC Defaults, Gov't Acts Excusing -  
Specifications Problems - Complex-  
ities of Transcription Services

Technical Order Writing

52. 24872 AAAE&DI 1) Performance - Directions by Gov't -  
Incomplete Directions  
2) Property - Gov't-Furnished Material  
- Reproducible Copy  
3) Modifications - Changes - Formali-  
ties of Orders - Quality - Compli-  
ance with Specifications - Workman-  
ship

e. ENGINEERING AND TECHNICAL SERVICES

f. OPERATION OF GOVERNMENT-OWNED EQUIPMENT, FACILITIES, AND  
SYSTEMS

Operation of Audio Visual Services

37. 29995 APII Property - Risk of Loss - Absolute  
Liability

56. 29272      APII      Procedure, Boards - Motions to  
29832      Dismiss - Premature Appeal
- Manage/Operate/Maintain Publications Distribution Office
68. 28602      CL&DCI      Bids and Offers - Modifications -  
Delivery After Bid Opening - Benefit  
to Gov't
- Transient Alert Service & Support Equipment Maintenance
3. 34257      CCC      Contract Disputes - Statement of  
Adequacy - Demand for Final Decision
- Operations/Maintenance of The Production Flight Test  
Installation
41. 30369      N&AI      Performance - Interference by Gov't  
- Sovereign Acts
- Operation/Maintenance/Support of The Concrete Missile  
Early Warning Station
28. 28721      RSC      Options - Notice of Exercise -  
Service Contract Act - Applicability  
of Wage Determination to Option

g. COMMUNICATIONS SERVICES

h. ARCHITECT-ENGINEERING

Architectural & Engineering Services

45. 30552      ML&S      1)A&E Services - Scope of Contract-  
Minor Changes  
2)A&E Services - Performance -  
Predesign Advice  
3)A&E Services - Performance - Defec-  
tive Specifications  
4)A&E Services - Performance - Change  
in Form of Specifications
62. 28154      DMJM/NEC      1)Contract Disputes - Jurisdiction of  
Boards - Disputes Clause Authority  
2)Procedure, Boards - Summary  
Judgement - Legality of Pre-Act Set-  
off  
3)Procedure, Boards - Summary  
Judgement - Materiality of Facts

- 4) Payments - Contract Debts - With holding of Contract Payments - Debt Collection Act of 1982
- 5) Procedure, Boards - Pleadings - Answers - Complaint Sufficiency

i. TRANSPORTATION AND RELATED SERVICES

Vehicle Maintenance/Operations/Transportation Analysis

- |     |                |        |  |
|-----|----------------|--------|--|
| 8.  | 32587<br>32588 | LSIMSD | Reprocurement - Assessment of Excess Costs - Improper Termination  |
| 20. | 32483          | TSC    | Payments - Measurement for Payment - Overtime                      |
| 23. | 30224          | LSIMSD | Options - Validity of Exercise - Conditional Exercise              |
| 25. | 27855          | UCSI   | Modifications - Bars to Claims - Finality of Modification          |
| 27. | 30635          | WARI   | Property - Risk of Loss - Service Contracts at Gov't Installations |
| 38. | 30247          | GSI    | Procedure, Boards - Evidence - Unsubstantiated Claims              |

Bus Service

- |     |       |       |   |
|-----|-------|-------|---|
| 12. | 29311 | FL&SI | <ol style="list-style-type: none"> <li>1) Cost Types - Termination Costs - Common Items v. Idle Capacity</li> <li>2) Cost Types - Termination Costs - Depreciation</li> <li>3) Cost Types - Termination Costs - Initial Costs</li> <li>4) Cost Types - Termination Costs - Costs Continuing After Termination</li> <li>5) Convenience Terminations - Recovery - Facilities Capital Cost of Money - Contractor's Accounting System</li> <li>6) Convenience Terminations - Recovery - Direct v. Indirect Costs</li> <li>7) Cost Types - Termination Costs - Claim Preparation Costs</li> <li>8) Cost Types - Termination Costs - Direct v. Indirect Costs</li> <li>9) Convenience Terminations - Recovery - Mitigation</li> <li>10) Cost Types - Termination Cost - Advertising Costs After Terminations</li> </ol> |
|-----|-------|-------|---|

- 11) Convenience Terminations - Recovery  
- Estimated Salary Costs
  - 12) Convenience Terminations - Recovery  
- Risk of Loss
  - 13) Cost Types - Terminations Costs -  
Direct v. Indirect Costs
  - 14) Convenience Terminations - Recovery  
- Mitigation
19. 31701 JMSI
- 1) Contract Disputes, Claims -  
Statement Adequacy - Notice That  
Final Decision is Required
  - 2) Contract Disputes, Certification -  
Amount of Claim - Specificity of  
Statement
29. 29311 FL&SI
- 1) Awards - Notice of Award - Unincor-  
porated Changes
  - 2) Convenience Terminations - Property  
- Bad Faith
- Moving and Storage of Household Goods
26. 31100 F&GM&SC
- 1) Defaults, Gov't Acts Excusing -  
Payments - Deductions for  
Deficiencies
  - 2) Reprocurement - Duty to Mitigate -  
Reasonableness of Cost
48. 28743 RT&SC
- 1) Contract Disputes, Contracting  
Officer's Decision - Gov't Claims -  
Submission
  - 2) Contract Disputes - Gov't Claims -  
Notice
  - 3) Interpretation of Contracts - Moving  
& Storage - Packaging - Damage to  
Goods
60. 27398 FM&SI
- Interpretation of Contracts - Moving  
and Storage - Damage to Goods
- Aircraft Leasing for Civil Air Patrol
63. 26964 ESdbaAI
- Performance - Risk Allocation -  
Damage to Contractor's Property

j. RESEARCH AND DEVELOPMENT

### Appendix C: Finality of Board Decisions

In order to ascertain the finality of the decisions by the ASBCA, it was necessary to do further research to determine if any of the cases were appealed to a higher authority and overturned. The population case list was sent to the Federal Legal Information Through Electronics (FLITE) office in Denver Colorado. Mr. Tim Skinner, one of the FLITE attorneys, conducted a search using the ASBCA case number and one using the ASBCA paragraph number. Only one of the cases was found to have been cited in a case beyond the ASBCA level, but only as a citation in support of another case. No evidence of any of the cases appealed to a higher authority and overturned was found. Some of the ASBCA case decisions are fairly recent and may not have been docketed by a higher authority at this point in time. Depending on the caseload, some of the cases may have been appealed but not heard at this time (9).

## Bibliography

1. Beran, Donald L. "Specifications: The Duty Trilogy: Government and Contractor Responsibilities Part One: The Drafter's Duty to Convey Unambiguous Information and the Others Duty to Seek Clarification," Contract Management, 27: 4-7 (August 1987).
2. Beran, Donald L. "Specifications: The Duty Trilogy: Government and Contractor Responsibilities Part Two: The Duty to Disclose Superior Knowledge," Contract Management, 27: 12-14, 42-43 (September 1987).
3. Beran, Donald L. "Specifications: The Duty Trilogy: Government and Contractor Responsibilities Part Three: The Duty Not to Hinder Contract Performance and Directions by the Government," Contract Management, 27: 11-15, 42-43 (October 1987).
4. Board of Contract Appeals Decision. Volumes 83-1 through 88-1. Chicago: Commerce Clearing House, Inc., 1983-1988.
5. Department of Defense, General Services Administration, National Aeronautics and Space Administration. Federal Acquisition Regulation, inclusive of Federal Acquisition Circular 84-37. Washington: Government Printing Office (April 1984).
6. Ewart, Lt Col Loel A. "The Disputes Process: Are Final Decisions Final?" Contract Management, 28: 16-19, 50 (April 1988).
7. Mahoy, Dr. James O. and Ernest R. Keucher. Government Contract Law. Air University, Air Force Institute of Technology, School of Systems and Logistics (1987 edition).
8. Merrill, 1Lt William E. and Capt Linden J. Torchia. Air Force Construction Contract Disputes: An Analysis of Armed Service Board of Contract Appeals Cases to Identify Dispute Types and Causes, MS Thesis, AFIT/LSSR/88-82. School of Systems and Logistics, Air Force Institute of Technology (AU), Wright-Patterson AFB OH, September 1982 (AD-A122988).
9. Skinner, Tim, FLITE Attorney, Federal Legal Information Through Electronics. Personal interview. HQ USAF/JAS, Denver CO, 25 August 1988.

10. Sulzemeier, Capt George S. and Capt Dennis D. Underwood. Contract Disputes: An Analysis of Key Issues. MS Thesis, AFIT/LSSR 26-79A. School of Systems and Logistics, Air Force Institute of Technology (AU), Wright-Patterson AFB OH, June 1979 (AD-A073021).
11. United States Department of the Air Force. Base Level Service Contracts. Air Force Regulation 400-28. Washington DC: Government Printing Office, 1979.
12. United States General Accounting Office. The Armed Services Board of Contract Appeals Has Operated Independently. GAO/NSIAD-85-102 (September 23, 1985).

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[REDACTED]  
[REDACTED]




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22a. NAME OF RESPONSIBLE INDIVIDUAL Douglas C. Osgood			22b. TELEPHONE (Include Area Code) (513) 255-4552	22c. OFFICE SYMBOL AFIT/DEM

were to: 1)

\*  
The purpose of this study was to examine and qualify Air Force service contract cases appealed to the Armed Services Board of Contract Appeals. ~~The study had three basic objectives~~ (1) Determine what types of service contracts are most likely to have disputes appealed to the ASBCA; (2) List the cases and claim categories and examine cases of the predominant claim categories of the cases appealed; (3) Determine what lessons might be learned from the cases appealed. and

The study found that the services with the most appeals during the five year time period included Housekeeping and Base services; followed closely by Transportation and related services; and Maintenance, overhaul, repair, and modification of systems, supplies, and equipment. The predominant claim categories included Interpretation of Contracts, Changes and Board Procedures.

The lessons to be learned from the cases range from the use of better communication between government personnel and the contractor, more care should be exercised in the preparation on specifications, and performance reviews might be conducted to ensure the specifications and requirements provide a sound basis for performance. Keywords:

Contract administration; Federal law; Service contracts; Disputes; Claims, (Theses, etc)

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